91-419

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

ADAM SOMMER, an infant, by Laura Sommer, his mother, individually and in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, Deceased,

Petitioner

—against—

JOHN D. BENNETT, ESQ., individually and as Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

—and—

JAMES D. BENNETT, ESQ., individually and in his capacity as Attorney for JOHN D. BENNETT, ESQ., Guardian Ad Litem appointed by Order of the Surrogate's Court County of Nassau for ADAM SOMMER,

—and—

JAMES D. BENNETT ESQ., ROBERT J. PAPE, ESQ., GEORGE F. RICE, ESQ. and RICHARD J. SCHURE, ESQ. d/b/a BENNETT, PAPE, RICE & SCHURE, in their capacity as Attorneys for John D. Bennett, Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Must the decision of the United States Court of Appeals for the Second Circuit Court, affirming the dismissal of petitioner's case under the probate exception to federal jurisdiction and which conflicts with decisions of other United States Courts of Appeals, be reversed?

Has the United States Court of Appeals for the Second Circuit Court decided a federal question, that the court below lacked subject matter jurisdiction for lack of standing and ripeness, in a way that conflicts with applicable decisions of this Court?

Does the decision by the United States Court of Appeals for the Second Circuit Court sanctioned an obvious, far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

ADAM SOMMER, an infant, by LAURA SOMMER, his mother, individually and in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, deceased, respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced in the appendix at B 1. The memorandum decision of the district court is unreported and is reproduced in the appendix at D 1.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Second Circuit affirmed the District Court's decision, essentially

adopting the lower court's rationale for it's own by summary order dated April 19, 1991. See Appendix "B." Although a petition for rehearing was filed, the Circuit Court refused to review the case by order dated June 6, 1991. See Appendix "A." Petitioner now seeks a writ of certiorari pursuant to Rule 10 of the Rules of the Supreme Court of the United States to correct the errors below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

See appendix E.

STATEMENT OF THE CASE

Petitioner, fifteen-year-old Adam Sommer (referred to hereinafter as "ADAM"), a resident of the State of Nevada, is the grandson of the late Sigmund Sommer and a vested, contingent beneficiary of Sigmund Sommer's Estate.

(hereinafter "The Estate"). ADAM, as a vested contingent beneficiary, has an identifiable, ascertainable and legally protectable interest in the principal and future income of the Estate that was reported to be worth almost one billion dollars. This action in diversity against his former law guardian and attorneys[1/] was based upon fraud, breach of statutory duties, negligence, attorney malpractice, and breach of fiduciary duty.

[1/] Respondents, the defendants below, James D. Bennett, Esquire, Robert J. Pape, Esquire, George S. Rice, Esquire, and Richard J. Schure, Esquire, d/b/a Bennett, Pape, Rice & Schure, a.k.a. Bennett, Scholley, Pape, Rice & Schure (hereinafter "Bennett, Pape, Rice & Schure") and John D. Bennett, Esquire of counsel to the aforesaid law firm (hereinafter referred to as BENNETT), are attorneys with offices located in the State of New York. Bennett, Pape, Rice & Schure were the attorneys for BENNETT in his capacity as Guardian Ad Litem for the Sommer grandchildren, appointed by an order dated November 13, 1984, of the Surrogate's Court, County of Nassau, State of New York.

As shown in the amended complaint, through a series of questionable transactions the Estate was looted. Despite the fact that respondents were put on notice of the questionable transactions, they permited the Estate to be closed without questioning the transactions. This failure to question resulted in injury to petitioner.

The respondents are politically well connected and had an undisclosed interlocking network of relationships with the Surrogate Court Judge and the looters of the Estate.

This highly publicized action arises out of proceedings concerning the Estate of Sigmund Sommer[2/], who died a resident of the State of New York, County of

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[2/] The late Sigmund Sommer had been a prominent real estate developer, leaving a vast estate with assets today valued in the hundreds of millions of dollars.

Nassau, on April 30, 1979. Sigmund Sommer's Last Will and Testament, dated April 3, 1977 (hereinafter the "Will"), was duly admitted to probate on May 7, 1979. Letters Testamentary thereunder were issued to Viola Sommer, the widow of Sigmund Sommer, (the petitioner's grandmother) and to Murray B. Felton, Esquire (hereinafter referred to as "Felton") on May 7, 1979. Felton is a former Nassau County Justice.[3/]

Because of improper taking of and waste of Estate assets, revealed to the Surrogate's Court by the Sommer family, respondent BENNETT a former Surrogate Judge, in the County of Nassau, State of New York and BENNETT, PAPE, RICE & SCHURE, were appointed by the court

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[3/] The law firm of Dreyer & Traub, in which Murray B. Felton, Esquire was a partner, became the attorneys for the Estate of Sigmund Sommer.

guardian ad litem of the infant contingent beneficiaries, and the guardian ad litem's assistants or attorney's. Respondents had an attorney-client and fiduciary relationship with ADAM. Based on this relationship, they had a duty to exercise the skill and care ordinarily possessed by attorneys of similar training, knowledge and experience under the circumstances by investigating the facts and circumstances involving Estate principal to ensure that ADAM's interests were protected, recouping any damages to ADAM's interests, and zealously protecting those interests through prompt action to recover any damage to those interests. BENNETT and BENNETT, PAPE, RICE & SCHURE

breached this duty due to conflicts of interest.[4/]

As a result of Respondents' breach of duty, ADAM's interests were not protected. Estate principal was decreased as a result of improper commissions and legal fees taken by the former executor Murray Felton and his law firm, Dreyer & Traub, which remain unchallenged by the guardian ad litem. The Estate's assets' value, cash flow, appreciation or equity were not maximized; and due to the sale of undervalued Estate assets, ADAM was further damaged.

[4/] BENNETT and BENNETT, PAPE, RICE & SCHURE also had a business relationship with Surrogate Radigan, who appointed them as assistants to BENNETT. In spite of this relationship with Surrogate Radigan, they did not decline their appointment as assistants to the GAL or at least ask Surrogate Radigan to recuse himself. These conflicts of interest, which they knew or should have known existed, were not disclosed to ADAM.

The damages in this case are ascertainable to a certainty. BENNETT, owed a duty to his wards to use a standard of reasonable care, which he failed to exercise due to conflicts of interest.[5/]

Although, Estate assets, which were part of principal, were sold at amounts below fair market value by Felton and Dreyer & Traub in a series of transactions that should have put the defendant BENNETT on notice that further investigation was required, BENNETT ignored these facts and basically approved suspicious transactions without making any reasonable investigation. The aforesaid taking of improper commissions

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[5/] Respondent BENNETT had a long and ongoing personal relationship with Surrogate Radigan, who appointed BENNETT GAL to ADAM. In spite of this relationship with Surrogate Radigan, BENNETT did not decline his appointment as GAL or at least ask Surrogate Radigan to recuse himself.

and legal fees, and the disposition and sale of Estate assets for less than their fair market value, resulted in a measurable decrease in ADAM's interest in principal.

The Circuit Court below in affirming the District Court's dismissal of the complaint[6/], stated, with reference to Counts I, III, IV and VIII, that ADAM's interest was not yet ripe for adjudication. While the grounds for dismissal of the remaining counts are not clear, it can be surmised that the District Court determined that ADAM lacked standing, and that the probate exception applies to the entire complaint. The Circuit Court erroneously affirmed the District Court's

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[6/] As set forth further below, the purported issues raised by the defendants below mired the real issues in this case and actually have no bearing on petitioner's right to seek redress in the United States District Court.

determination and the procedural aberration through which it was reached.

a). Certiorari is Warranted:

The United States Court of Appeals for the Second Circuit rendered a decision in conflict with its own decisions and those of other United States Courts of Appeals on similar issues. BENNETT and BENNETT, PAPE, RICE & SCHURE, by the acts of commission and omission set forth in the complaint, and while acting under color of law, unconstitutionally deprived ADAM of his property rights. By affirming the complained of decision, the Circuit Court sanctioned the obvious and far departure from the accepted and usual course of judicial proceedings. This Court, being charged as the guardian of our constitutional must exercise its inherent

power of supervision and overturn this gross miscarriage of justice.

The Courts below have applied one standard for the general public and another, totally different standard where as in the case at bar, it is a politically well-connected ex-judge who has committed the misdeeds[7]. They erroneously ignored the governing standard under New York law that petitioner has an identifiable property interest that was severely damaged by the misdeeds of the respondents. The Court's erroneously found that ADAM lacked standing. The Circuit Court misapprehended that BENNETT's failure to question the sale of two parcels of real

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[7] Curiously, although the District Court rendered a 59 page decision involving one of the largest estates in the country and said decision was contrary to existing law and cases, neither the decision or the affirmance was published.

property for prices that were millions of dollars below their fair market value adversely affected ADAM's undisputed interest in principal as well as his legally recognized and protected interest in future income. The Circuit Court failed to recognize that $1,840,750.00 in paid commissions that were charged against principal adversely affected ADAM's undisputed interest in principal as well as his legally recognized and protected interest in future income, as distinguished from past income, which conferred standing to ADAM to seek legal redress. The Circuit Court[8/] overlooked

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[8/] The appellate panel that reviewed this matter and issued its decision dated April 19, 1991, consisting of Judges Kearse, Kaufman and McLaughlin, will hereinafter be referred to as the "Panel."

or misapprehended significant facts[9/] and well settled law applicable in this case, therey misperceiving ADAM's standing to litigate the allegations of injury to his interest in future income and, accordingly had rendered a decision inconsistent with decisions of this Court.

The courts below confused the nature of ADAM's damaged property interest. That petitioner has no interest in past income does not as a matter of law

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[9/] The Circuit Court misapprehended the status of the proceeding in the Surrogate's Court. The Estate of Sigmund Sommer has been closed. While there is pending a proceeding to reopen the estate on grounds of coercion, whether that proceeding will ever be opened is speculative, at best. Laura Sommer, the mother and court appointed as well as natural guardian of Adam Sommer (petitioner), has never been a party to any proceeding in the Surrogate's Court of the State of New York involving the Estate of Sigmund Sommer. The Circuit Court misapprehended facts as it was misled by defense counsel as to the status of pending estate proceedings. The only Estate proceeding pending at the time this action was presented to the Circuit Court was a motion to reopen the Estate based upon the coercion of a co-executer by the attorney executor.

justify the complete dismissal of ADAM's claims in Counts II, V, VI and VII of the complaint, as those counts also concern his vested interest in future income.

The Circuit Court's overlooking or misapprehending the distinction between ADAM's standing to litigate issues concerning his interest in future, as opposed to past, income presents a question of exceptional public importance. The right of not only ADAM, but also litigants similarly situated as he, must be acknowledged and protected by this Court to avoid conflict among the panels of the Circuit Courts as to whether or not a plaintiff may maintain an action for injury to a legally recognized and protected interest in future income on facts such as those at issue here.

Additionally, the Circuit Court mistakenly found ADAM's claims in Counts I, III, IV, and VIII to be not ripe because it overlooked or misapprehended facts and well settled law concerning ADAM's showing of a distinct and palpable injury to himself that is likely to be redressed if the issues raised relative to his interest in Estate principal were tried. ADAM's claims do not rest upon any uncertain and contingent future events. For example, a clear and distinct cause of action is set forth in Count VIII of the complaint addressing the fact that BENNETT breached his duty to ADAM by negligently failing to adequately and prudently perform his contractual and statutory duties owed to him. He and BENNETT, PAPE, RICE & SCHURE allowed the Estate to be closed without questioning or investigating the

inadequacy of the price received from sale of real properties, when they knew or should have known that the selling price was substantially understated. The injury suffered by ADAM, the reduction in his interest in Estate principal, is readily calculable and likely to be redressed at a trial.

Furthermore, the Circuit Court's overlooking or misapprehending that ADAM's claims are ripe for adjudication on the facts presented, is in conflict with previous decisions of Circuit Courts and the United States Supreme Court.

Finally, the Circuit Court sanctioned a procedural aberration below that is such a far departure from the usual and accepted judicial proceedings that the supervisory power of this court should be exercised. As set forth below, the procedural posture from which this

case reached the Circuit Court was the conversion of a motion to dismiss to one for summary judgment by the District Court. Although a standard and usual requirement on such a motion was ignored by the respondents, submission of a statement of uncontested facts, the District Court nevertheless resolved issues presented by petitioner in favor of the respondents. The Circuit Court sanctioned this serious procedural irregularity.

b) Factual Background:

The law firm of Dreyer & Traub, in which Felton was a partner, became the attorneys for the Estate of Sigmund Sommer, with the final account of the Estate being ultimately settled by Decree in the Surrogate's Court, Nassau County, on September 24, 1986 (hereinafter referred to as the "Estate Decree").

By order of the Surrogate's Court of Nassau County, signed by Honorable C. Raymond Radigan (hereinafter referred to as "Judge Radigan"), on November 13, 1984, BENNETT was appointed Guardian Ad Litem (hereinafter referred to sometimes as GAL) to appear for and to protect the interests of the infant contingent beneficiaries of the Estate after prima facie proof of iregularies and theft was presented to the court by the Sommer family. BENNETT and his assistants filed their qualifications and consent to appear for the Sommer grandchildren on or about November 14, 1984.

The GAL's duties are defined by statute in McKinney's Surrogate's Court Procedure Act ("SCPA") 404(3) as follows: 1) File an appearance on behalf of his wards; 2) Investigate the facts of the proceeding; 3) Review all papers filed

with the court; 4) Do any necessary legal research in order to ascertain his wards' interests and to enable him to take all necessary steps to protect them; and 5) File a report of his activities and his recommendations with the court.

Although patent evidence of fraud, misrepresentation, overreaching, misappropriation, and breach of fiduciary duties and self-dealing by Felton and Dreyer & Traub during their tenure as fiduciaries for the Estate was brought to BENNETT and BENNETT, PAPE, RICE & SCHURE's attention, he totally ignored the evidence that was plainly before his eyes and failed to take any action or make any further inquiries. They did not even note or question the circumstances surrounding the administration of the Estate which would have caused a reasonable person in their position to

question and/or to take affirmative action to protect the interests of their ward, ADAM.

BENNETT, as GAL, owed ADAM the following statutory and fiduciary duties: 1) Investigate the facts of the proceeding; 2) Review all papers filed with the court; and 3) Do any necessary legal research in order to ascertain and protect his wards' interest and to enable BENNETT, who represented himself as an expert in New York estate law, with twenty-seven (27) years of experience as a Surrogate in Nassau County, New York, knew or should have known his obligation to meet these duties. BENNETT breached those duties by failing to make proper independent investigations of the suspicious sales of assets in non-arms length transactions and failing to zealously and promptly pursue actions to

recoup damages to ADAM's interests and protect him from further predations.

Respondent BENNETT falsely represented that a true and accurate analysis of all documents, facts and accounting was accomplished and that no improprieties as to the sale of Estate assets or the payment of Felton's commissions existed.

Adam and Laura Sommer, his parent and legal guardian of his person and property, relied on the representations of the GAL and expected Respondent BENNETT to take independent action to recover any and all damages to ADAM's interests.

As a result of the GAL's misrepresentations and ADAM's reliance thereon, ADAM has sustained injury in that he has been unable to recoup the

damage to his interests in principal caused by Felton and Dreyer & Traub.

Because of the personal and business relationships between BENNETT and BENNETT, PAPE, RICE and SCHURE and Surrogate Radigan, none of them questioned the judgments or findings of the other, thereby denying ADAM independent, effective, competent and zealous representation. As a result, of the lack of independent, effective and competent representation, the improprieties causing injury to ADAM's interest were not questioned and no effort was made to recoup the damages suffered. ADAM was thereby injured in that he could not recover the damages to his interest even as improprieties were brought to light through newly discovered evidence.

c). ADAM'S Interest:

It is undisputed that ADAM has a contingent remainder interest in the Article Six Trust principal set forth in the Will. He also has a contingent remainder interest in future income; that is, he has an interest in income only once it is no longer paid to Viola Sommer or her three children under the terms of the Article Six Trust. ADAM'S interest is recognized and protected by New York Law. See, e.g., N.Y. Estates, Powers and Trust Law, Section 6-1.1 (McKinney 1967); N.Y. Real Property Actions and Proceedings Law, Sections 811, 831 (McKinney 1979). ADAM also has an interest in the $1,840,750 in paid commissions that were charged against principal and the undervalued sales of the 48th and 53rd Street properties set forth in more detail below.

ADAM'S interest in principal is implicated by four counts of the complaint:

> 1) Count I, which alleges that the defendants intentionally and fraudulently failed to have an independent appraisal; 2) Count III, which alleges that James Bennett and the firm breached their statutory duty by failing to obtain appraisals on the 48th and 53rd Street properties and by failing to call for an opening of the estate; 3) Court IV, which alleges that the defendants were negligent in failing to take action to recover assets that were misappropriated by Felton, including the failure to question the commission agreement; and 4) Court VIII of the complaint, which alleges that John Bennett breached his fiduciary duty to question "the many acts of fraud or other improprieties committed by Felton and Dreyer and Traub," as well as his failure to obtain appraisals for the 48th and 53rd Street properties.

The damages in this case are ascertainable to a certainty. Principal was decreased as a result of the improper

commissions and legal fees taken by then former executor Felton and his law firm, Dreyer & Traub. Also, Estate assets, which were part of principal, were sold at amounts far below fair market value by Felton and Dreyer & Traub.[10/]

BENNETT falsely represented that a true and accurate analysis of all documents, facts and accountings was accomplished and that no improprieties in the sale of Estate assets or the payment of Felton's commissions existed despite all of the above.

d). Procedural Posture:

The court below sanctioned an obvious, far departure from the accepted

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[10/] Felton and Dreyer & Traub deceived Viola Sommer, widow of the decedent, into disposing of Estate assets by misinforming her of the facts. Felton told Viola Sommer that Sigmund Sommer's Will prohibited her from building on the 48th Street property, which was false.

and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. The procedural setting of the decision from which ADAM appealed to the Circuit Court is one of summary judgment. BENNETT and BENNETT, PAPE, RICE & SCHURE's motion pursuant to Fed. R. Civ. P. Rule 12 was converted into a Rule 56 motion for summary judgment by the trial court. However, as demonstrated below, the effect of the trial court's decision on this motion was vitiated by its disregard of procedure.

POINT I

THE CIRCUIT COURT ERRONEOUSLY AFFIRMED THE DISMISSAL OF PETITIONER'S CASE UPON THE PROBATE EXCEPTION TO FEDERAL SUBJECT MATTER JURISDICTION

A. THE PROBATE EXCEPTION IS INOPERATIVE HERE

The Circuit Court below, just as the District Court, have failed to recognize that the New York State Surrogate's Court below had limited the issue in that proceeding to whether Viola Sommer was coerced into closing the Estate. Accordingly, the probate exception is inoperative here. For this reason, the trial court erred in dismissing the Amended Complaint pursuant to the probate exception. Accordingly, the Circuit Court erred in sanctioning that dismissal.

a). Probate Exception:

Respondents contend that the alleged ongoing Estate proceeding in the State court precludes ADAM from claiming certain injury in the District Court. However, the conduct of the respondents in this matter is not at issue in the state court and, thus, there is no

potential for "interference with the state probate proceedings."

In an attempt to distinguish Celentano v. Furer, 602 F. Supp 777 (S.D.N.Y. 1985), respondents previously and erroneously reasoned that Celentano does not address "interference" which is the primary issue here. A careful review of that case reveals that, just as in Celentano, the instant claims pending before the federal court are not before the Surrogate. Celentano, 602 F. Supp at 782.

It is quite clear that despite averments to the contrary, the Estate proceedings before the Surrogate's Court does not present a preclusive forum for redress to the ADAM. Id.; Rice v. Rice Found, 610 F.2d 471 (7th Cir. 1979)(federal courts have jurisdictional so long as they do not interfere with the

probate proceedings); Matter of Piccione's Estate, 57 N.Y.2d 278 (1982).

Furthermore, the Circuit Court below appears to have confused two issues. Although the adequacy of a guardian ad litem's fees may be subject to the probate exception, acts of negligence and fraud are not. Compare In re Estate of Johnson, 142 Misc.2d 388, 539 N.Y.S.2d 243 (New York Surr. Ct. 1988) with Matter of Piccione, 57 N.Y.2d 274, N.Y.S.2d (1982).

b). Abstention:

Although identifying appropriate legal authority on the question of abstention, respondents previously failed to adequately comprehend, interpret and apply the same. The Circuit Court erred in adopting this reasoning.

Upon a careful review of the five factors to be considered in determining

the abstention issue, it is clear that the facts in this case weigh in favor of an immediate adjudication of the issues presented in the district court. United States V. Pinka, 880 F.2d 1578 (2d Cir. 1989); Giardina V. Fontana, 733 F.2d 1047 (2d Cir. 1984); Beach v. Rome Trust Co., 269 F.2d 367 (2d Cir. 1959). Although no one factor is determinative, the court must carefully consider its obligation to exercise jurisdiction and the factors counselling against exercising jurisdiction. Colorado River Water Conservation Dist. v. U. S., 424 U.S. 800, 818 (1976). Without a clear justification, dismissal is inappropriate.

The Surrogate's Court proceedings may primarily concern the exercise of jurisdiction over property. However, this, the instant case, does not.

Rather, it is the conduct of the respondents and the injury resulting therefrom that is the gravamen of this action. Inasmuch as this is a diversity action, any convenience afforded by the forum weighs in favor of exercising jurisdiction too. Despite respondents' reasoning to the contrary, the parties to this action are only before the District Court since the Surrogate's Court proceeding does not address the conduct of the respondents here. Since the conduct in question, and the parties answerable therefor in this action, is different from the conduct and parties under review in the Surrogate's Court proceeding, there is actually no realistic danger of duplicative litigation.

Also, the fact that the Surrogate's Court obtained jurisdiction over the

issues raised by Viola Sommer in 1987 presents no substantial justification for the District Court to refuse to exercise jurisdiction over independent causes of action. Finally, the issues of malpractice and other actionable conduct to be determined in this action simply do not call upon the District Court to resolve or decide intricate state law issues as respondents contended below. The bare essence of this action is of the application of well settled legal principles of negligence, fraud and breach of fiduciary duty in a diversity action.

For all the reasons argued above and previously by ADAM, there are no exceptional circumstances that merit abstention.

Accordingly, ADAM's standing is clear, and as set forth further below,

his claim was at the time of the decision below, and is at present, ripe for review.

POINT II

THE CIRCUIT COURT OVERLOOKED OR MISAPPREHENDED SETTLED FACTS AND LAW WHICH DEMONSTRATE THAT PETITIONER HAS STANDING AND HIS CLAIMS ARE RIPE FOR REVIEW

By failing to recognize ADAM's claim for damages as to future income, the Circuit Court focused only on past income to which he clearly has no standing. Summary Order, Sommer v. Bennett, No.90-7908, dated April 19, 1991.

It is undisputed that ADAM has a contingent remainder interest in future income.[11/] (Memorandum and Decision,

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[11/] The Court overlooked the fact that defendants below conceded that if Counts II, V, VI and VII of the complaint were construed to include claims involving damage to all income, both past and future, and/or principal, then standing exists for all counts as to future income and principal. [Db. 18.]

(continued...)

dated September 10, 1990, Mishler, D.C.J., Appendix "D."). ADAM's interest is both recognized and protected by New York State Law. See e.g., N.Y. Estates, Powers and Trust Law, section 6-1.1 (McKinney's 1967); N.Y. Real Property Actions and Proceedings Laws, sections 811, 831 (McKinney's 1979). Inasmuch as petitioner's claims set forth in Counts II, V, VI and VII of the complaint concern injury to income, with no distinction made between past and future income, he clearly has standing as to the claims relative to future income.

On the rationale of a panel of the United States Court of Appeals for the Second Circuit in American Motorists Ins. Co. v. United Furnace Co., Inc., 876 F.2d

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11/ (...continued)
Furthermore, although defendants generally attack the plaintiff's standing, they nonetheless qualify their argument to only past income.

293 (2d Cir., 1989), the Circuit Court misapprehended the significance and scope of petitioner's interest when it focused on past income. Although American Motorists concerns a customs bond surety bringing action against its principal to recover under an indemnification agreement, the reasoning of that case is analogous and lends support here.

The District Court in American Motorists, just as the District Court below here, failed to recognize a distinction between claims presented, and accordingly, overlooked or misapprehended the significance and scope of the plaintiff's claims.[12/]

[12/] The District Court failed to recognize petitioner's claims relative to his interest in future income. The Panel also overlooked these claims set forth in Counts II, V, VI and VII of the complaint.

Also, the Court's rationale in Giardina v. Fontana, 733 F.2d 1047 (2d Cir. 1984), is somewhat analogous and is also of guidance here. In Giardina, the plaintiff sought a declaratory judgment that the assignment of her interest in her deceased father's estate was obtained by undue influence and fraud. A common law tort action. Plaintiff also sought an accounting and the imposition of a constructive trust. In reversing the District Court and finding subject matter jurisdiction present, the court reasoned:

> *. . . the complaint can be interpreted, however, to request an accounting and imposition of a constructive trust only as to property that [had] been distributed . . . and longer subject to the jurisdiction of the probate court.*

Likewise, the Circuit Court here, overlooked a significant set of facts and

its viable claims, thereby misapprehending the standing and ripeness of petitioner and his claims.

That the Circuit Court overlooked or misapprehended the distinction between petitioner's standing to litigate issues concerning his interest in future as opposed to past income, presents a question of exceptional public importance because the right of not only ADAM, but also litigants similarly situated as he, must be acknowledged and protected by this Court.

Moreover, in order to review an issue of great public importance, and avoid conflict among the Circuit Courts as to whether or not a plaintiff may maintain an action for injury to a legally recognized and protected interest in future income on facts such as those

at issue here, certiorari is appropriate.[13/]

With petitioner having alleged a legally protectable interest in future income, and said interest having been both acknowledged and recognized by the court below, and said interest having been alleged to have been improperly reduced, petitioner's injury is real and immediate.

A. ADAM SOMMER'S CLAIMS ARE RIPE FOR ADJUDICATION

The trial court below has mischaracterized ADAM's claims set forth in Counts I, III, IV, and VIII of the Amended Complaint. Just as the Circuit

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[13/] The appellate review serves a dual process: The correction of legal error and the establishment of legal rules for future guidance. Here, the law clarifying function of the appellate process predominates warranting the attention of the full court. See generally, Church of Scientology of California v. Internal Revenue Service, 792 F.2d 153 (D.C. Cir. 1986)(en banc), footnote 1.

Court and District Court below, respondents failed to recognize that these counts concern among other things, the fees paid out to the executor and the executor's law firm that are properly identified as damage to estate principal. See N.Y.E.P.T.L. §11-2.1(d)(1) and 11-2.1(l)(4)(McKinney's 1991). Furthermore, these counts concern the undervalued real property which is also an asset of estate principal.

The above noted miscomprehension of the relevant claims and applicable law, coupled with the undisputed facts that ADAM has a contingent remainder interest in principal and also a contingent remainder interest in future income in the Article Six Trust, establishes that the court below erred in holding that he has no standing to raise the claims in

Counts I, III, IV and VIII of the Amended Complaint on the grounds of ripeness.

a). Standing and Ripeness:

It is undisputed that ADAM's contingent interest at issue here is both recognized and protected by New York law. See N.Y.E.P.T.L. §6-1.1 (McKinney's 1991); N.Y.R.P.A.P.L. §811 and 831 (McKinney's 1991). Respondents have offered no argument to the contrary.

The Circuit Courts below failed to fully comprehend the nature of these claims and the resulting injury complained of. Upon the facts presented below, it is clear that the respondents had a duty (both statutory and fiduciary) to ADAM. They have breached that duty, thereby proximately causing injury or damage to ADAM.

Respondents breached their fiduciary duty of loyalty by acting in ADAM's

behalf under conflicts of interest. As a direct result of conflicting interests, respondents failed to take any actions to ascertain improprieties and/or to recover estate assets transferred by reason of improprieties. The failure to properly discharge their duties, to prepare and submit competent, accurate reports, and ensure that they properly characterized ADAM's interest under the will, and to further ensure that the Surrogates Court Procedure Act was followed, has proximately caused ADAM to suffer the 'distinct and palpable' injury set forth below.

The injury complained of is 'distinct and palpable' inasmuch as $1,840,750 in paid commissions have been charged against estate principal. Additionally, the undervalued sale of an Estate asset, the 48th and 53rd Street

properties, likewise represent actual damage or injury to Estate principal. Other damages flowing directly from these wrongs include loss of equity and cash flow in estate assets, and the loss of opportunity to convert assets into more profitable forms. Thus, ADAM's standing is not contingent upon whether or not Felton and Dreyer & Traub have committed wrongs.

Accordingly, petitioner has standing on these issues and the claims in Counts I, II, IV and VIII are ripe as set forth below.

The harm to ADAM as caused by respondents is complete and irreparable. Counts I, II, IV and VIII of the Amended Complaint show that respondents failed to diligently investigate on behalf of ADAM; they failed to recognize and protect ADAM's interest; they failed to

adequately review papers submitted in the underlying matter; they failed to fully research the matter, failed to submit accurate reports and failed to determine whether the court had full and adequate information; and, as a result, they failed to make competent recommendations to the court.

By not recognizing that the questions at issue are essentially legal rather than factual,[14/] the Circuit Court misapprehended the ripeness issue. The legal question presented to the court below is whether or not, on the facts as they exist at the time of the filing of

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[14/] By overlooking the nature of the relationships of the parties here, and the scope of petitioner's claims, the Court misapprehended the facts and applicable law. The allegations regarding petitioner's interest in the substantially undervalued sale of the 48th and 53rd Street properties is not contingent upon future events. Since petitioner has a protectable interest he must have standing.

the complaint, the respondents are liable for negligence and breaches of contractual and statutory duties.

The United States Supreme Court has approached the ripeness issue as follows:

> *The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

The twofold test set forth in Abbott Laboratories is well established and utilized. See e.g., Warth v. Seldin, 422 U.S. 490 (1975); Town of Rye New York v. Skinner, 907 F2d 23 (2d Cir. 1990); Isaac v. Browne, 865 F.2d 468 (2d Cir. 1989); Volvo N. Amer. v. Men's Intern. Pro. Tennis Coun., 857 F.2d 55 (2d Cir. 1988).

The fitness inquiry is concerned with whether the issues sought to be adjudicated are contingent on future

events or may never occur. 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §3532 (1984). The fitness of an issue for judicial decision depends then, at least in part, on the extent to which the issue is purely legal, and will not be clarified by further factual development.

This case is ripe for resolution because their is nothing else for plaintiff or defendants to do. See Town of Rye New York, supra. All actionable events have occurred. The remaining questions are primarily the application of established common law tort principles, and clearly defined contractual and statutory obligations and duties, to settled facts.[15/]

[15/] Adam has alleged that Bennett and Bennett, Pace, Rice & Schure owed him a duty through the attorney-client relationship that existed. He has further alleged that they (continued...)

Town of Rye New York, Petitioner's claims do not in their entirety rest upon uncertain and contingent future events regarding the conduct of Estate Co-Executor Felton or his attorneys, Dreyer and Traub. The Circuit Court misapprehended the nature of the claims here.

As an illustration, a clear and distinct cause of action set forth in Count VIII of the complaint addresses the fact that respondent BENNETT breached his duty to ADAM by negligently failing to adequately and prudently perform his contractual and statutory duties owed to him.

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[15] (...continued)
breached their duty to him, and that, as a proximate result thereof, he suffered injury. There is nothing in the elements of this attorney malpractice suit that predicates liability only upon a showing of the liability of others outside of the attorney-client relationship at issue.

The Circuit Court overlooked or misapprehended the facts relative to the closing of the Estate.[16/] Respondents allowed the Estate[17/] to be closed without questioning or investigating the substantially undervalued sale of the 48th and 53rd Street properties, despite their actual knowledge of possible wrongdoing. Respondents were clearly contractually and statutorily obligated

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[16/] It is well a established policy of the Surrogate's Court to defer making fee awards to court-appointed counsel until all contested proceedings have been terminated or judicially settled. See, e.g. In Re Forman's Will, 238 A.D. 388 (First Dept. 1933); In Re McKenzie's Estate, 155 Misc. 822 (Surr. Ct., Kings Co. 1935). The obvious rationale behind this policy is that prior to completion of the proceedings, it is impossible to determine whether, and to the extent to which, court-appointed counsel has enhanced or protected the interests of his ward. Once respondent BENNETT accepted his fee and the Estate closed, his term as Guardian Ad Litem was ended.

[17/] The Estate of Sigmund Sommer was admitted to probate in the Surrogate's Court of the County of Nassau. On September 24, 1986, Surrogate Radigan signed a final accounting Decree, thus closing the Estate.

to protect ADAM's interest in the Estate. However, ADAM has shown respondents negligently and/or willfully failed to so.

The arguments that the ripeness of ADAM's claims are contingent upon any future events are distracters which caused the Circuit Court to misapprehend the ripeness issue.[18/]

At no time has the law firm of Bennett, Pape, Rice & Schure, the attorneys for John D. Bennett, had any official standing with the Surrogate's Court County of Nassau with respect to the Estate of Sigmund Sommer, except for

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[18/] The entire defense is based upon speculative future contingencies. Whether the Estate is opened based upon Viola Sommer's coercion; whether there is a finding of fraud once the estate is opened; whether the current Guardian Ad Litem asserts rights purportedly reserved by respondent BENNETT, are all conditional limitations they are not condition precedents to petitioner's right to bring the action below.

having acted as attorneys for John BENNETT. Contrary to the assertion of counsel for respondents, made to the Circuit Court at oral argument, a malpractice action against any of them can not possibly have any effect upon any Surrogate's Court Proceedings.

Yet, counsel for the respondents[19/] argued that Adam and his mother are so intricately interwoven into those Surrogate's Court proceedings so as to defeat ADAM's present claims to jurisdiction in the Federal Court on matters having nothing whatsoever to do

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19/ Defense counsel created a false picture of "ongoing" Surrogate's Court proceedings. Most crucially, counsel insisted that the current Surrogate's proceedings involved fraud. She ignored the fact that Surrogate Radigan, specifically and unequivocally, limited the issue before the Court to the question of Viola Sommer's state of mind, i.e., coercion. Clearly, there is no issue of fraudulent conduct before any court, as evidenced by the decision of Surrogate Radigan, which sets the sole issue as coercion.

with the sole issue of coercion of an executor, presently being addressed by the Surrogate's Court in an otherwise closed estate. The Circuit Court was apparently misled by the erroneous assertions of respondent's counsel.[20/]

That the Circuit Court overlooked or misapprehended that ADAM's claims are ripe for adjudication on the facts presented, is clearly in conflict with previous decisions of both the United States Supreme Court and the Second Circuit Court. See Abbott Laboratories, supra, and Town of Rye New York, supra.

Furthermore, the hardship to ADAM if the controversy here is not resolved is real. Since the harms alleged here have already taken place, the immediacy of the

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[20/] The misleading misrepresentations of counsel for respondents alone should be grounds for reconsideration.

harm prong of the hardship inquiry is satisfied. If ADAM is forced to await the occurrence of the contingent and speculative events focused on by the Court below, he is denied his right to review of this controversy in Federal Court. It is very likely that he will lose his right to sue his previous Guardian Ad Litem,[21/] due to his previous GAL'S health conditions and advanced age.

Recent events have proved that only the Federal Courts are the only forum

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[21/] Any and all attempts by the Sommer family members to expand the Surrogate's Court proceedings beyond the initial limited scope set forth by Surrogate Radigan, despite incontrovertible evidence as to wrongdoing committed by the co-executor and the law firm, have been fully and totally rebuffed by the Surrogate's Court.

Any and all attempts by Laura Sommer, the Court appointed Guardian of her children's property, to come in to address these wrongs have been completely frustrated by the subsequent rulings of the Surrogate's Court. Contrary to the assertion of counsel for the respondents, during oral argument to the Panel, at no time has Laura Sommer ever been a party to the Surrogate's Court proceedings.

that can provide ADAM with a proper redress for the wrongs committed by the respondents.[22/]

b). BENNETT's Duties as Guardian Ad Litem (GAL) are Complete with Respect to the Proceeding in which the Wrongful Conduct is Alleged.

The Circuit Court erroneously accepted respondents' contention below that BENNETT's duties as GAL to the Sommer grandchildren in conjunction with Murray Felton's 1984 petitioning of the Surrogate to file a final accounting of the Estate ("Felton proceeding") should be viewed as continuing with regard to the duties of the GAL of the Sommer grandchildren in conjunction with another

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22/ Laura Sommer has been denied even the opportunity to just submit papers opposing an outrageous interim fee request by the current Guardian ad Litem who was ultimately awarded fees in excess of $400,000.00 despite the shocking fact that the current Guardian submitted absolutely no time records to support his request.

proceeding, namely Viola Sommer's petition in the Surrogate's Court to vacate and open the decree settling the final account. This argument is without merit but was in essence accepted by the District Court and adopted by the Circuit Court. Clearly, these are two separate proceedings for which a guardian was appointed, each with its own particular duties.

A guardian ad litem by definition is a special guardian appointed by the court to represent the interests of an infant or incompetent in a legal proceeding. Kossar v. State, 13 Misc.2d 941, 179 N.Y.S.2d 71 (1958). BENNETT was appointed GAL by order of the Nassau County Surrogate's Court dated November 13, 1984, to protect the interests of the Sommer grandchildren with respect to the Felton proceeding of petition. That

proceeding has been completed. BENNETT's term as GAL was completed.

Consistent with this view is the fact that BENNETT himself acted pursuant to the standard termination procedures of N.Y.S.C.P.A. §404. Upon termination, he filed a report on his activities together with his recommendation. Additionally, the court indicated that BENNETT's term as GAL for this proceeding was completed on that date when it acted pursuant to §405 and gave BENNETT what the Court felt was reasonable compensation "[f]or services rendered." N.Y.S.C.P.A. §405).

The fact that subsequent to this completion, a separate proceeding has been brought in the Surrogate's Court which he <u>again</u> was "<u>appointed</u>" GAL by J. Radigan is of no consequence. It is a separate apportionment and a separate representation. Radigan could have

appointed any qualified person for the position.

Thus, as demonstrated above, BENNETT's duties as GAL for the Sommer grandchildren with respect to the Felton proceeding is certainly completed, and his behavior during that representation susceptible to court action.

Furthermore, respondents' previous intellectually strained argument that respondent BENNETT has effectively reserved rights that may be exercised by the present guardian ad litem is wholly untenable and without legal authority. The logic of respondents' argument below implies that, to avoid a claim of malpractice, all one needs do is reserve the right to institute proceedings to remedy a previous wrongdoing. The false premise respondents relied upon in reaching their conclusion, that one

attorney may insulate himself from malpractice through reservation of rights, must be dismissed as unsound and irrational.

ADAM's contingent interest is subject to valuation and the injury thereto (by reason of the conduct complained of here) can also be calculated. See N.Y.R.P.A.P.L. §401 (McKinney's 1979)(expressly providing among other things, a means to valuate an interest in real property dependent as to value upon the duration of one or more lives in being, whether such interest is present or future). See also N.Y.R.P.A.P.L. §831 (McKinney's 1991); See generally, Duffield v. United States, F. Supp 944 (E.D. Pa. 1956); Curry Estate v. Commissioner, 74 T.C. 540 (1980).

Because the Circuit Court miscomprehended the nature of ADAM's

causes of action in Counts I, III, IV and VIII of the Amended Complaint, and the injuries caused thereby, it erred by finding that he lacks standing to bring the claims at issue here on the ground of ripeness when it adopted the district court's rationale on this issue.

POINT III

THE CIRCUIT COURT SANCTIONED AN OBVIOUS FAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The procedural setting of the decision from which ADAM appealed below is one of summary judgment. Respondents' motion pursuant to F.R.C.P. Rule 12 was converted into a Rule 56 motion for summary judgment by the trial court. [A 1602]. However, as demonstrated below, the effect of the trial court's decision on this motion was vitiated by its disregard of procedure. The Circuit

Court has in effect sanction the obvious and far departure from normal procedure set forth below.

Rule 56 of the Federal Rules of Civil Procedure is a rule that allows a court to bypass the formal fact finding process of a trial where the material facts of the action are known and are not in dispute. In such a case, the court may, upon motion, simply apply the undisputed facts to the relevant law and render its decision. Applied in this manner, Rule 56 serves the overall goal of the Federal Rules of Civil Procedure as set forth in Rule 1: To obtain the just and speedy determination of an action. 6 J.Moore, W. Taggart & J.Wicker, Moore's Federal Practices, 56.02 (1987).

However, the recognized downside to summary judgment is that its improper application may very well work to

frustrate this goal. Specifically, where the formal fact finding process of a trial is wrongly bypassed, i.e. where indeed there are material facts in dispute, the resulting determination will be anything but "just," resources will have been wasted, and justice will have been "delayed." See Id. at 56.02 (discussing Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 365 (5th Cir. 1951), cert denied, 341 U.S. 934 (1951), and Painton & Co. v. Bourns, Inc., 442 F.2d 216, 232-233 (2d Cir. 1971)). An awareness of this problem is noted in Brunswick Corp. v. Vineberg, 370 F.2d 605, 612 (5th Cir. 1957), where the court stated that "[s]ummary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use."

In an effort to avoid this potential harm, the Southern and Eastern Districts of New York adopted certain procedural guidelines that the trial courts are to follow in deciding a motion for summary judgment. In particular, Local Rule of Civil Procedure 3(g) establishes a summary judgment process that brings to the forefront of the litigation the facts and issues on which the parties agree or disagree. This rule requires any motion for summary judgment to be accompanied by "a separate, short and concise statement of the material facts as to which the moving party contends there is no issue to be tried." Correspondingly, the opposing party is required to submit a similar statement "of the material facts as to which it is contended there exists a material issue to be tried." Through this process, a motion for summary

judgment can be sufficiently evaluated and decided.

Additionally, evidence of how strongly the district values the rule's function is readily apparent from a reading of the rule's plain text. Rule 3(g) states that the failure of the moving party to submit a 3(g) statement "constitutes grounds for denial of the motion." Correspondingly, if the non-moving party fails to controvert the material facts set forth in the moving party's 3(g) statement, those facts will be deemed to be admitted. Local R.C.P. 3(g).

Therefore, in consideration of the fundamental reasons for the local rule and the seriousness that the district attaches to its compliance, the fact that the lower court did not outright dismiss respondents' motion for summary judgment

is a mystery. Upon that motion, the respondents (movants) never submitted a 3(g) statement and J. Mishler neither immediately dismissed the motion on that ground, nor ordered the statement to be included. This put ADAM in the awkward position of submitting a statement pursuant to rule 3(g) not knowing exactly which facts that the movants claimed were undisputed and which entitled them to judgment as a matter of law.

This breakdown of the "3(g) process" led the lower court to misapply the summary judgment standard. In fact, as is evident in the point below, it practically forced the lower court to decide disputed questions of material facts instead of "determining only whether or not they exist." U.S. v. Diebold Inc., 369 U.S. 654 (1962); Schering Corp. v. Home Insurance Co., 712

F.2d 4 (2d Cir. 1983). Wherefore, upon this procedural irregularity, the decision of the District Court, the Circuit Court should be reversed on the grounds that it has sanctions an obvious, far departure from normal procedure.

CONCLUSION

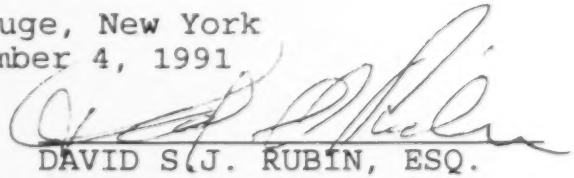
ADAM's right to bring this action is established as his personal interest in this matter is well recognized and protected by both State and Federal, decisional and statutory law. Thus, there is no true justification for not allowing ADAM his day in court as the distinct, ripe and palpable injuries complained of are identifiable and subject to valuation.

For all the reasons set forth above, the Circuit Court below erred and, accordingly, must be reversed, and this matter remanded for a trial on the

merits. Upon the record below, this diversity action is one for ripened legal malpractice, fraud, and other claims not subject to the probate exception to federal subject matter jurisdiction.

WHEREFORE, petitioner respectfully requests a writ of certiorari be granted as the Circuit Court overlooked or misapprehended facts and points of law in its review of this matter. The issues here concern matters of significant public interest and a review by this Court will prevent conflict among the various Circuit Courts as well as allow a review of a question concerning a fundamental property right.

Dated: Hauppauge, New York
September 4, 1991.



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 90-7908

(Seal of the United States Court of Appeals, Second Circuit, dated June 6, 1991, Elaine B. Goldsmith, Clerk)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of June, one thousand nine hundred and ninety-one.

ADAM SOMMER, an infant, by Laura Sommer, his mother, individually and in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, Deceased,

Plaintiff - Appellant,

v.

JOHN D. BENNETT, Esq., individually and as Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for Adam Sommer; JAMES D. BENNETT, Esq., individually and in his capacity as Attorney for John D. Bennett, Esq., Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for Adam Sommer; JAMES D. BENNETT, Esq.; ROBERT J. PAPE, Esq.; GEORGE F. RICE, Esq.; and RICHARD J. SCHURE, Esq. d/b/a BENNETT, PAPE, RICE & SCHURE, in their

capacity as Attorneys for John D. Bennett, Guardian Ad Litem appointed by order of the Surrogate's Court, County of Nassau for Adam Sommer,

Defendants - Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant, Adam Sommer.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/S/
ELAINE B. GOLDSMITH
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 90-7908

(Seal of the United States Court of Appeals, Second Circuit, dated April 19, 1991, Elaine B. Goldsmith, Clerk)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of April, one thousand nine hundred and ninety-one.

Present: HONORABLE IRVING R. KAUFMAN,

HONORABLE AMALYA L. KEARSE,

HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges,

ADAM SOMMER, an infant, by Laura Sommer, his mother, individually and in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, Deceased,

Plaintiff - Appellant,

- v. -

JOHN D. BENNETT, Esq., individually and as Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for Adam Sommer,

- and -

JAMES D. BENNETT, Esq., individually and in his capacity as Attorney for JOHN D. BENNETT, ESQ., Guardian Ad Litem appointed by Order of the Surrogate's Court County of Nassau for ADAM SOMMER,

- and -

JAMES D. BENNETT, ESQ., ROBERT J. PAPE, ESQ., GEORGE F. RICE, ESQ.; and RICHARD J. SCHURE, ESQ. d/b/a BENNETT, PAPE, RICE & SCHURE in their capacity as Attorneys for John D. Bennett, Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court by and it hereby is affirmed.

Plaintiff Adam Sommer, an infant, by Laura Sommer, his mother (collectively "Sommer"), appeals from a judgment of the United States District Court for the Eastern District of New York, Jacob

Mishler, Judge, dismissing his complaint for lack of subject matter jurisdiction on the grounds (1) that Sommer either had no standing or his claims were not ripe, and (2) that in any event, all of Sommer's claims were dismissable under the probate exception to federal jurisdiction. On appeal, Sommer contends principally that the court erred in these rulings and erred in denying Sommer's motion to disqualify defendants' attorneys. For the reasons below, we affirm.

We have considered all of the parties' arguments, including postargument submissions that have provided a great deal of heat but little light with respect to the merits of this appeal, and we affirm the dismissal of the complaint substantially for the reasons stated at pages 48-56 of Judge Mishler's Memorandum and Order dated September 10, 1990 ("Opinion"). To the extent that Sommer's claims focus on income payments in the past, he lacks standing for the reasons stated at pages 48-51 and 53-55 of the Opinion; to the extent that Sommer's claims focus on his interest in principal, his claims are not ripe for the reasons stated at pages 51-53 and 55-56 of the Opinion. We affirm the district court's denial of Sommer's motion to disqualify defendants' attorneys substantially for the reasons stated at pages 58-59 of the Opinion.

The judgment of the district court is affirmed.

/S/
IRVING R. KAUFMAN, U.S.C.J.

/S/
AMALYA L. KEARSE, U.S.C.J.

/S/
JOSEPH M. McLAUGHLIN, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX C

C 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOCKET NUMBER CV 89-3696(JM)

JUDGMENT

(Seal - United States District Court, Eastern District of New York, Entered 9/24/90)

ADAM SOMMER, an infant, by Laura Sommer, his mother, individually and in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, deceased,

Plaintiff,

- against -

JOHN D. BENNETT, Esq., individually and as Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for Adam Sommer,

- and -

JAMES D. BENNETT, Esq., individually and in his capacity as Attorney for JOHN D. BENNETT, ESQ., Guardian Ad Litem appointed by Order of the Surrogate's Court County of Nassau for ADAM SOMMER,

- and -

JAMES D. BENNETT, ESQ., ROBERT J. PAPE, ESQ., GEORGE F. RICE, ESQ.; and RICHARD J. SCHURE, ESQ., d/b/a BENNETT, PAPE,

RICE & SCHURE, in their capacity as Attorneys for John D. Bennett, Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

Defendants .

A memorandum of decision and order of Hon. Jacob Mishler, United States District Judge, having been filed on September 10, 1990, dismissing the complaint for lack of subject matter jurisdiction, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; and that the complaint is hereby dismissed.

Dated: Uniondale, New York
September 21, 1990

ROBERT C. HEINEMAN
Clerk of the Court

By: /S/
JOSEPH DI TALIA
Deputy Clerk-in-Charge

APPENDIX D

D 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 89-3696

ADAM SOMMER, an infant, by Laura Sommer, his mother, individually and in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, Deceased

Plaintiff,

-against-

JOHN D. BENNETT, ESQ., individually and as Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

-and-

JAMES D. BENNETT, ESQ., individually and in his capacity as Attorney for JOHN D. BENNETT, ESQ., Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

-and-

JAMES D. BENNETT, ESQ., ROBERT J. PAPE, ESQ. GEORGE F. RICE, ESQ. and RICHARD J. SCHURE, ESQ., d/b/a BENNETT, PAPE, RICE & SCHURE, in their capacity as Attorneys for John D. Bennett, Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

Defendants

Memorandum of Decision and Order
September 10, 1990

A P P E A R A N C E S :

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Attorneys for Defendants
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Nancy Ledy-Gurren, Esq., Of Counsel
Judith A. Davidow, Esq., Of Counsel

MISHLER, District Judge

This is an action based upon the defendants' alleged violations and breaches of legal, fiduciary, and contractual duties to plaintiff. Jurisdiction is based upon diversity of citizenship, 28 U.S.C. § 1332(a)(1) (Supp. 1990).

The defendants John D. Bennett,

Esq., James D. Bennett, Esq., and Bennett, Pape, Rice & Schure ("Bennett") move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b) for lack of subject matter jurisdiction, and, if jurisdiction exists, that the court should abstain from exercising jurisdiction over the subject matter; for failure to join necessary parties pursuant to Fed. R. Civ. P. 19; and for failure to state a claim. The court has converted this ground for dismissal into a summary judgment motion pursuant to the provisions of Fed. R. Civ. P. 12. See Sommer v. Bennett, CV 89-3696 (E.D.N.Y. July 17, 1990) (converting 12(b)(6) motion to summary judgment and granting the parties ten days in which to serve and file additional materials). The plaintiff, Adam Sommer, cross-moves for an order staying the action and

disqualifying Bennett's counsel for violation of the duty to Sommer to maintain confidences, for failure to exercise independent judgment, and for failure to avoid the appearance of impropriety.

BACKGROUND

A. Proceedings in the Surrogate's Court

I. The Will

Sigmund Sommer, the grandfather of the infant-plaintiff Adam, died on April 30, 1979. He was survived by his widow Viola Sommer and three children: Jack Sommer, Susan Sommer Schweitzman, and Barbara Sommer Fisher. He was also survived by seven grandchildren. Subsequently, two other grandchildren were born. (John Bennett Aff., ¶ 5.)

Sommer's estate consisted of real estate holdings worth millions of dollars. One of the properties, North

Shore Towers, was threatened with bankruptcy. Thus, the management and ultimate accounting of the estate were extremely complex. It took over six years before the final accounting of the real estate was approved by the Nassau County Surrogate. (John Bennett Aff., ¶ 6.)

The Sommer will, executed April 3, 1977, appointed Viola Sommer, "my friend and attorney, Murray B. Felton," and Bankers Trust Company as executors and trustees. (Def. Ex. A, ¶ 14A.) Bankers Trust Company declined to serve and apparently Viola Sommer declined to appoint a new co-executor. (John Bennett Aff., ¶ 7.) The will also designated the law firm of Dreyer and Traub as attorneys for the estate and the trusts. (Ex. A, ¶ 14B.)

The will created two trusts. The

first, contained in Article Five ("Article Five Trust"), was a marital deduction trust in favor of Viola Sommer with the principal payable, upon her death, pursuant to a general power of appointment to be exercised in her will. (Ex. A, ¶ 5.) The second trust, contained in Article Six ("Article Six Trust"), held the residuary estate. The income of this trust was to be distributed, in the discretion of the trustees other than Viola, to Viola "at such time or times and in such amounts as my trustees in their absolute discretion shall determine." (Ex. A, ¶ 6.) The remaining net income, or all of the net income, "as the case may be," was to be distributed to the three adult Sommer children, per stirpes. Thus, only if an adult Sommer child died was the income from the Article Six Trust to be

distributed to a grandchild. Thus, under the Article Six Trust the grandchildren have a contingent interest in future income.

Upon the death of Viola, the principal and any undistributed income of the trust was to be distributed pursuant to the provisions of Article Seven. (Def. Ex. A, ¶ 6.) Article Seven provided that the principal from the Article Six Trust was to be divided into as many equal parts as equalled the number of children who survived Viola and the number of predeceased children who left issue that survived Viola. (Def. Ex. A, ¶ 7A.) One part was to be distributed to the issue, per stirpes, of any deceased child. (Def. Ex. A, ¶ 7A(1).) One such equal part was to establish a trust fund for each living child. The child was to receive income

from the trust for the life of the trust, and principal was to be distributed as follows: one-third at age forty; one-half at age forty-five; and the balance at age fifty. (Def. Aff., ¶ 7A(2).) If any child died before the age of fifty, the trust principal and all undistributed income was to be paid to the issue of the deceased child per stirpes. (Def. Ex. A, ¶ 7A(2)). Thus, for any grandchild of Sommer to take under this will, the grandchild must survive both parent and grandmother. Therefore, the grandchildren possess a contingent remainder interest in the principal of the Article Six Trust. The grandchildren do not have an interest in past income, which would be distributed to Viola, and possibly her children, under the terms of the Article Six Trust and Article Five Trust.

2. The Commission Agreements

In 1980, Viola Sommer and Murray Felton entered into an "Agreement with Respect to Executor's Commissions." (Def. Ex. B.) They agreed that Murray Felton would be paid $2,500,000 in executor's commissions. In 1984, Viola Sommer and Murray Felton had a dispute over the 1980 commission agreement. On August 15, 1984, Felton petitioned the Surrogate's Court for a final accounting of the estate. (Def. Ex. D.) In the petition, Felton requests $1,400,000 in legal fees for Dryer and Traub and the full statutory commissions, including commissions for the collection of rents and the management of real property, for himself. (Def. Ex. D, p. 4.)

Jack Sommer, Viola Sommer's son and Laura Sommer's husband, had his attorneys, Howard, Darby & Levin, prepare

a memorandum addressed to the Surrogate's Court, Nassau County. The memorandum, dated December 1984, requested that Felton be removed summarily and ordered to repay his fees and commissions. (Def. Ex. C.) The memo charged, inter alia, that Felton commingled assets and paid himself commissions without court approval and contrary to the agreement with Viola Sommer. This memo, which details the substance of the alleged claims of wrongdoing that were resurrected in the Surrogate's Court in 1987, was known to the Sommers' independent counsel, Weil, Gotshal & Manages as well as Howard, Darby & Levin. (Ex. M, p. 14.) The report of the guardian ad litem, dated August 2, 1988 (Def. Ex. M), states that a cover sheet indicates this memo was delivered by courier to Felton by Jack Sommer on or

about December 14, 1984. (Def. Ex. M, p. 17.)

On December 15, 1984, Viola Sommer and Felton entered into a new commission agreement. (Def. Ex. E.) It states, "Whereas, Felton and Sommer are desirous of resolving certain differences over commissions and other matters relating to the Estate and the Trusts." (Def. Ex. E.) To resolve these differences, Sommer agreed to pay Felton, as commissions, $3.5 million dollars and $100,000.00 per annum for the rest of his life. (Def. Ex. E, ¶ 9.) In paragraph eleven of the agreement she signed, Viola Sommer "agrees to indemnify and hold Felton harmless (including, without limitation, the payment of any legal fees and disbursements in connection with defending any claim) against any claims that may be made against Felton by an

beneficiary or contingent beneficiary of the Estate, should any claims be made against Felton by them arising out of Felton's conduct heretofore as an executor or trustee of the Estate." (Ex. E, ¶ 11.) An identical indemnification clause protects Felton against "any claim for reimbursement of expenses taken by Felton." (Ex. E, ¶ 11.) In return, Felton was to resign as co-executor.

Sommer executed the documents necessary to be filed in the Surrogate's Court in connection with the accounting of the estate, including three amended recountings for the estate and trusts, waivers and consents for the three accountings, and designation of successor trustee. (Def. Ex. E, ¶ 2.) In addition, Viola Sommer executed general releases of Felton and Dreyer and Traub. (Def. Ex. E, ¶ 3; Def. Ex. F.) Jack

Sommer also executed general releases of Felton and Dreyer and Traub. (Def. Ex. F). At the time the agreement and releases were signed, Jack Sommer was represented by Howard, Darby & Levin; Viola Sommer was represented by Weil, Gotshal and Manges; and the decedent's other two daughters were represented by Shea and Gould. (Ex. M, p. 17.)

3. Settlement of the Estate and the Guardian ad Litem

The petition of Viola Sommer and Murray Felton to the Surrogate's Court sought three things: judicial settlement and approval of the Final Account of Proceedings of the Executors of the decedent's Estate, including approval of payment of Felton's commissions; judicial settlement and approval of the Final Account of the Trustees of the Article Five Trust; and judicial settlement and

approval of the Intermediate Account of the Trustees of the Article Six Trust, together with leave of the court for resignation of Felton and appointment of Jack Sommer and Henry Goodman as successor trustees to serve with Viola Sommer. (John Bennett Aff., ¶ 17.)

In conjunction with the proceeding to settle the final accounting of the executors, John Bennett, Esq. was appointed on November 13, 1984 by the Surrogate's Court to serve as guardian ad litem for the grandchildren of Sigmund Sommer, infants under the age of fourteen years. (Def. Ex. G.) As guardian ad litem, he appeared for and represented the interests of his wards in the estate of Sommer. "Because of the urgency in completing these proceedings as indicated by the attorneys, the substantial amounts being accounted for, and the depth of a

review that is required," the court appointed four attorneys to assist Bennett. (Def. Ex. G. p. 2.) By this arrangement, the court noted,

> The duties of the panel can be allocated among other things, to review the various schedules, address themselves to the specific prayer for relief, review the estate tax proceedings and elections given to the fiduciaries as to the overall administration of the estate and the choice regarding tax alternatives, computations of commissions, review of jurisdiction and the provisions for distribution.

(Def. Ex. G., p. 2.)

The Surrogate's Court also noted,

> The method selected to represent the wards will not burden them financially because

> the court will fix a fee as though only one individual was assigned the task to represent the interests of the wards.

(Def. Ex. G, p. 3.)

Thus, each attorney assumed responsibility for a subject area of the estate, such as taxes, and conducted an in-depth review that culminated in a report submitted to the Surrogate's Court on December 27, 1985. (Def. Ex. H.) The panel also submitted various supplemental reports on April 22, 1986 and September 24, 1986. (Def. Ex. I; John Bennett Aff. ¶ 19.) These reports reflect exhaustive and detailed inquires into the administration of the estate.

The 1985 report is divided into five areas: real estate, tax issues, schedules of the accounts, legal fees, commissions, and compensation of Jack

Sommer. (Def. Ex. H., p. 15.) Under real estate, Bennett reports that his review of the documentation provided him revealed two errors in the manner in which ownership of certain real property was recorded. His discovery resulted in the execution of a written assignment of 8.1666 percent interest in the property, by Viola Sommer, to the Article Six Trust. This interest is valued in excess of $20 million. (Def. Ex. H., p. 36.) He also secured the transfer of the remaining interest that the estate held in the real property from the Article Five Trust to the Article Six Trust. In his real estate section he concluded:

> I am satisfied that the executors' and trustees' administration of these holdings was prudent, demonstrated a high degree of sophistication and

> was of great benefit to the estate, the trusts and their beneficiaries.

(Def. Ex. H, p. 55.)

Under the tax area, Bennett noted that the executors inadvertently overfunded the marital deduction bequest in order to, inter alia, receive favorable tax treatment for the estate. (Def. Ex. H, p. 63.) Viola Sommer subsequently returned the overpayment, but at the value at the time of original distribution. Bennett simply noted the situation because of its highly unusual facts and concludes that the executors acted with prudence. (Def. Ex. H, p. 65.)

In the area of legal fees, Bennett states that the records maintained by Dreyer and Traub were complete and documented all areas for which charges

were made. He considered the charges fair and reasonable and did not object. (Def. Ex. H. p. 74.) Regarding the commissions to be paid to Felton, Bennett stated in his report

> that if the total statutory commissions had were calculated on the basis of total principal received ($63,053,281); on income received ($86,214,828); on principal paid ($80,417,234); on income paid ($86,214,828); and on rents collected ($80,126,131), such commissions would have totaled $6,823,858, and would have far exceeded the total agreed to by Murray B. Felton.

(Def. Ex. H, p. 75.)

In addition, all unpaid commissions are chargeable to income. Paid commissions, $1,840,750, were charged against

principal. Since the commissions did not affect his wards save to the $1,840,750 already paid, Bennett did not object. (Aff. of Bennett, p. 11; Def. Ex. H., p. 75.) In sum, in the 1985 report Bennett is "of the opinion that the executors and trustees have administered the estate and trusts in the best interests of all the beneficiaries." (Def. Ex. H., p. 78.)

In his April 22, 1985 report, Bennett states that he discovered a large brokerage claim against the estate which had not been used as a tax deduction. In addition, he received indications from the court that it was not inclined to accept the repayment of the overfunding of the marital bequest at the value at which it had been distributed to Viola Sommer. Bennett discussed these matters with the attorneys for the executor and the attorney for Viola Sommer. He was

able, with regard to the overfunding, to negotiate a settlement in which the widow-executor agreed to create a trust of one million dollars which would be held for the benefit of her grandchildren. (Def. Ex. I, pp. 3-4.)

In his supplemental report dated September 24, 1986, Bennett reviewed the resignation of Henry L. Goodman as trustee and the designation of Eugene Landsberg as successor trustee. (Def. Ex. I, pp. 1-7.) Eugene Landsberg is the brother of Viola Sommer. (Def. Ex. I, p. 8.) Goodman raised several complaints against Viola and Jack Sommer in his petition to resign, including his exclusion from business decisions and their accusations against him of wrongdoing and conflicts of interest. (Def. Ex. I, p. 7.) In addition, Landsberg was not the successor to

Goodman designated at the time Goodman was appointed on December 19, 1984. (Def. Ex. I, p. 6.)

A series of discussions ensued and a conference held before the court. A settlement was reached and executed on June 17, 1986, in which Goodman's application to resign was accepted, and Landsberg approved. The Sommer children renounced $600,000 each of the principal they may be entitled to under the Article Six and Seven Trusts. These funds were to create three trusts, one for each Sommer adult child's children, the income to be paid to Viola Sommer and, upon her death, the corpus of each trust to be distributed per stirpes to the surviving grandchildren. (Def. Ex., I, pp. 10-11.) The Surrogate's Court issued its final decree settling the account on September 24, 1986 and fixed the fee of each

guardian ad litem. (Def. Ex. J.) Due to Bennett's efforts, the wards received a $1,000,000 vested trust, a $1,800,000 vested life insurance trust, and an additional approximately $20,000,000 to the Article Six Trust, in which they are contingent beneficiaries.

4. Bleak House

On October 27, 1987, Viola Sommer, by order to show cause, petitioned the court, inter alia, to open and vacate the estate decree on the grounds of "the fraud, misrepresentation and overreaching of Felton and Dryer & Traub." (Def. Ex. K., p. 2.) She sought a surcharge and a declaration that the 1980 commission agreement was binding, and the December 1984 commission agreement unenforceable on the grounds of fraud, misrepresentation, overreaching, and lack of consideration by Felton and Dreyer and

Traub. (Def. Ex. K, pp. 2-3.) In addition, she requested that Dreyer and Traub's legal fees be disallowed for its breach of fiduciary obligations, improprieties, and misconduct. (Def. Ex. K, p. 4.) As elaborated in her affidavit of December 20, 1987, Felton

> engaged in and committed gross violations of his fiduciary obligations which defrauded this estate of substantial sums of money by, among other things, taking interest free loans of estate funds without this court's knowledge, abrogating a 1980 commission agreement, overstating statutory commissions, transferring estate assets without my knowledge or approval and misleading me as to the appropriate handling of estate

> assets. The law firm of Dreyer & Traub, who acted as attorneys for <u>both</u> Felton and me, breached their fiduciary obligations to me and to the estate, both through direct communications with me and by cooperating with and aiding and abetting Felton.

(Def. Ex. L, pp. 2-3.)

The motion to open the estate is directed at the period covered by the account of the executors, May 1, 1979 to December 31, 1985. (Ex. N., p. 1.)

Felton and Dreyer and Traub cross-moved on January 13, 1988. In addition to opposing Viola Sommer's application, Felton sought a judgment awarding him his attorney's fees, costs, and disbursements incurred in opposing Sommer's motion. This request was pursuant to the indemnification clauses in the 1984

settlement agreement. (Def. Ex. M, p. 5.)

Bennett was appointed guardian ad litem for his wards in this proceeding. (Aff. of John Bennett, ¶ 23.) In his report submitted to the Surrogate's Court on August 2, 1988, Bennett describes the interests of his wards in the Article Six Trust and states,

> It is axiomatic that I must oppose any course of action or decision which might decrease principal of the Article Sixth Trusts, or cause a reduction in any of the gains achieved for my wards.

(Def. Ex. M., p. 11.)

He also notes that at the hearing held on June 15, 1988, "The attorney for Mrs. Sommer stated that Mrs. Sommer would indemnify my wards for any loss resulting from her application to vacate and open

the estate decree." This representation was made in open court. (Def. Ex. M, p. 11.) Bennett also notes that the guardian ad litem is not bound by any releases or waivers executed between Felton and Sommer. The December 14 memo, "which was allegedly an integral part of the individual settlement between Felton and Mrs. Sommer, Jack and Dreyer and Traub, was not disclosed to the guardian." (Def. Ex. M, p. 15.) Bennett was appointed approximately one month before the memo and agreement of December 1984. In fact, Bennett states that although he was aware that

> Viola and Murray had some disagreements, the depth of their dispute and the irreparable nature of their falling out was hidden and not known to me. At the time that Jack Sommer's memo detailing the

> alleged wrongdoing of Felton was first prepared and circulated, I had no knowledge of it. In fact, did not learn of this memo until October of 1987.

(Bennett Aff., ¶ 15 n. 1; See Def. Ex. Q, p. 5, September 11, 1989 report of the guardian ad litem.)

In his report, Bennett reiterated his reasons for not objecting to Felton's commissions: it was for the most part chargeable against income, in which his wards had no interest; and he was unaware of the facts and circumstances raised by Viola Sommer. (Def. Ex. M, p. 18.) After evaluating each of Viola Sommer's allegations, he concludes,

> Felton and Dreyer and Traub have erected a formidable defense to the Petitioner's claims, that defense being founded upon the use of independent

counsel, Settlement Agreements, Waivers, General Releases and payment of the great weight of disputed payments from principal. Although the Guardian is not bound by these defenses, I must be concerned that reopening, being a two-way street, could result in Felton receiving larger commissions chargeable to principal. Petitioner's attorney has represented in open court that petitioner will indemnify my wards for any loss of benefits which might occur if the estate decree is vacated and the proceedings reopened. If this representation is properly documented and secured by a written indemnification agreement (which is subject to approval of the court), I do not oppose Mrs. Sommer's application to the extent that

> it might result in recovery of measurable benefit for my Wards.

(Def. Ex. M, p. 27.)[1]

In his supplemental report of August 2, 1988, Bennett requests that the court permit him

> to reserve any and all rights that my wards may have in and to any and all claims which might arise out of the sale and/or disposition of the real property known as the '48th Street Property' and the '53rd Street Property.'

(Def. Ex. M, pp. 2-3.)

In a decision dated October 4, 1988,

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[1]Although Viola Sommer consented to indemnify the wards of the guardian for any loss or damage due to reopening the decree, and although this consent by her and her attorneys was incorporated into the court decree, it appears that no indemnity was actually secured. See Ex. Y, October 11, 1989 Report submitted by John Bennett, p. 23.

Judge Radigan directed that the issue of whether Viola Sommer

> was rendered incapable of freely and rationally giving her consent to the 1984 settlement agreement by reason of the duress, coercion, fear or intimidation exerted on her by Murray Felton and Dreyer and Traub shall be set down for a hearing.

(Def. Ex. N, p. 7.)

This decision was incorporated into an accompanying order, in which Judge Radigan directed all pretrial discovery to be completed by December 31, 1988. (Def. Ex. O, p. 4.) Discovery has not been completed because Viola Sommer "has avoided participating in a deposition." (Bennett Aff., ¶ 24.)

On June 23, 1989, Laura Sommer moved the Surrogate's Court for permission to

intervene on behalf of her children and, inter alia, "for an order compelling the guardian ad litem to move this Court for an order fully opening and vacating the estate decree." (Def. Ex. P, p. 1.) In her accompanying affidavit, Laura Sommer states, "I seek repayment to the estate of these vast sums of money pillaged from the estate." (Def. Ex. P, Aff. of Laura Sommer, ¶ 2). She accuses both Bennett (Def. Ex. P, Aff. of Laura Sommer, ¶ 5A-J, 8) and the court (Def. Ex. P, Aff. of Laura Sommer, ¶ 15, 21-22) of being corrupt and unfit.

Bennett filed a report relating to Laura Sommer's application with the Surrogate's Court on September 11, 1989. (Def. Ex. Q.) Although he took no position regarding her motion to intervene, he suggested that her other requests be denied since "[i]t would

serve no good purpose at this time to launch a course of litigation which would be parallel to the matter currently pending." (Def. Ex. Q, p. 16.) In his report, Bennett noted that Viola Sommer, with the consent of the independent trustees, who are now her relatives (Jack Sommer and Eugene Landsberg), could withdraw any or all the principal of the Article Six Trust, effectively collapsing the trust and defeating any interest of the grandchildren. (Ex. Q, p. 3 & Ex. A, Cl. 6.)

On July 21, 1989, Laura Sommer made an application to the Surrogate's Court seeking an order to show cause for the recusal of Judge Radigan and the disqualification of John Bennett as guardian ad litem. (Aff. of John Bennett, ¶ 27.) She also applied by order to show cause dated August 3, 1989

to Hon. Patricia D. Collins, Justice of the Supreme Court, to recuse Surrogate Radigan. (Def. Ex. S.) This Article 78 application was referred to the Surrogate's Court. (Ex. Q, app. 2.)

In a decision dated August 8, 1989, Judge Radigan did recuse himself. (Def. Ex. T.) Although Susan and Jack Sommer requested Radigan's recusal on the basis of his "close personal relationship" with John Bennett, Judge Radigan states,

> The current record of accomplishments and achievements of the former Surrogate of this court needs no embellishment on this court. His selection as Guardian ad Litem was made on merit only and not on any personal or any business relationship which in any event never existed directly or indirectly.

(Def. Ex. T, p. 5.)

However, Felton and Dreyer and Traub informed Judge Radigan that they would be calling the guardian ad litem as a "witness to prove their contentions that there was full disclosure in bringing about the decree of September 24, 1986." Since the guardian's credibility would be put in issue, they requested that Judge Radigan recuse himself. (Def. Ex. T, p. 5.) Thus, Judge Radigan thought it would be "inappropriate for this court to pass on such issue after having worked for the former Surrogate as a law assistant, deputy chief clerk and chief clerk." (Def. Ex. T, p. 6.) All outstanding matters were referred to the acting Surrogate, Hon. Raymond Harrington.

Judge Radigan refused to remove the guardian ad litem for several reasons: one duty of the guardian is to exercise independent judgment; John Bennett was

chairman of the Bennett Commission, which reviewed New York's trust and estates law, and a former Surrogate of the Surrogate's Court, in addition to his other experience; and dissatisfaction with the guardian was only raised after he issued his report in the proceedings to open the estate. (Def. Ex. T, pp. 2-4.) On August 15, 1989, Laura Sommer and Jack Sommer made a motion for reargument of Judge Radigan's decision because it failed to disqualify the guardian ad litem. (Def. Ex. R.) This motion was dismissed. (Ex. Q, app. 3.)

In an order dated October 23, 1989, Judge Harrington denied Laura Sommer's motion to intervene and her motion to compel the guardian to institute a proceeding in Surrogate's Court. He also denied her application for a stay, her applications seeking the recusal of Judge

Radigan and the disqualification of the guardian ad litem, and her application to reargue the previous denial of her motion for recusal/disqualification. (Def. Ex. U.) These motions were denied, in part, because of Laura Sommer's lack of standing. She did not present the court with any documentation that she was a court appointed guardian.

B. <u>The Instant Action</u>

The amended complaint, which is seventy pages long, alleges fraud, breach of statutory duties (2 counts), negligence (2 counts), attorney malpractice (2 counts), and breach of fiduciary duty. The fraud claim is based on John Bennett's, James Bennett's, and the firm's (Bennett, Pape, Rice & Schure) knowledge of the conflicts of interest that existed because of John Bennett's relationship with Judge Radigan (he

allegedly represented Judge Radigan in more than one real estate transaction) (Complaint, ¶ 72) and Judge Radigan served as his law clerk (Complaint, ¶ 78); because of their own undisclosed attorney-client relationship with Chemical Bank, which held an eighty-million dollar mortgage on an estate asset (Complaint, ¶ 80); because John English, one of John Bennett's assistants, represented the Sommer family's opponents in litigation involving the estate (Complaint, ¶ 81); because Brian Seltzer, a former Dreyer and Traub partner who had previously represented Viola Sommer, joined English's firm and testified against the Sommers (Complaint, ¶ 81);[2] because Judge

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[2]As John Bennett stated to the Surrogate's Court, the alleged conflict of interest due to the activities of John English, Esq. was not brought to his

attention until after the guardian concluded his services. It was not an issue until after the date of the report and was a non-issue because of its remoteness. (Def. Ex. Y, Report of John Bennett dated October 11, 1989.) According to Bennett:

> Inquiry was made of the Honorable Bernard Meyer, a senior partner of Mr. English's firm and former Judge of the Court of Appeals of the State of New York, who advised,
>
> A. There was no conflict, and
>
> B. That the Honorable Howard Levitt, Justice of the Supreme Court, Nassau County, had reviewed that very issue which was raised by the Sommer family in a disputed case involving North Shore Towers and that Justice Levitt had ruled there was no conflict or basis for disqualification. Said case is entitled "VIOLA SOMMER and JACK SOMMER, as Trustees of the Trust under Article SIXTH of the Last Will and Testament of SIGMUND SOMMER, Deceased, ASHFORD REALTY CORP., and NST ASSOCIATES (Plaintiffs) against

THREE TOWER ASSOCIATES and NORTH SHORE TOWERS APARTMENTS INCORPORATED (Defendants)" the decision was dated June 19, 1987, Index Number 2280-87. The court stated inter alia as follows:

> "Disqualification of the Meyer firm based on Mr. English having served as an assistant to the Guardian ad Litem for eight of Sigmund Sommer's grandchildren should also be subject to these same tests. Mr. English's prior association with he plaintiffs, while remotely related to the issue being litigated, does not pose the threat that confidences will be revealed. It does not appear from the broad general allegation of the plaintiffs that Mr. English had access to information that was confidential and directed related to the subject matter at hand."

Radigan appointed Michael Feigenbaum, Felton's attorney, to at least six guardian ad litem positions (Complaint, ¶ 82); because Irving Tenenbaum, a judicial hearing officer in Nassau County had been acting as counsel for Dreyer and Traub until he was disqualified by Judge Harrington pursuant to the Rules of the Chief Administrator of the Courts (Complaint, ¶ 88); and because Henry Goodman, former trustee, had an undisclosed attorney-client relationship with Chemical Bank (Complaint, ¶ 84). According to the complaint, these conflicts "were an existing material fact which was known or should have been known to defendants. . . . Despite their duty to disclose such conflicting

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(Def. Ex. Y, Report of John Bennett dated October 11, 1989, pp. 24-25.)

relationships, defendants intentionally concealed their existence." (Complaint, ¶ 114.)

In addition, the fraud count alleges that the defendants knew or should have known that the 48th and 53rd Street properties, sold by Felton and Dreyer and Traub, were transferred for amounts substantially lower than the actual value of the properties. (Complaint, ¶ 121.) Finally, the defendants knew or should have known of Adam's stake in the will, in both estate principal and interest. The defendants deliberately and intentionally concealed this material fact. (Complaint, ¶ 116.) According to the complaint, Adam relied upon the representations made by the defendants in their reports and suffered injuries as a direct result of the fraud committed against him by the defendants

(Complaint, ¶ 118, 123.)

Count II alleges that John Bennett breached his duty to investigate on behalf of the wards and uncover the misdeeds of Felton and Dreyer and Traub. He has failed to take steps designed to fulfill his duty to investigate. (Complaint, ¶ 130.) The complaint alleges that Bennett failed to recognize Adam's contingent interest in estate income and protect it. (Complaint, ¶ 131.) The complaint alleges that Bennett and his assistants failed to adequately review papers in the underlying matter, to fully research this matter, to submit accurate reports, to determine whether the court had full and adequate information, and to make competent recommendations to the court when they failed to call for an opening of the estate. (Complaint, ¶ 130-136.) In

addition, the firm and James Bennett breached their duty to competently advise John Bennett on Adam's behalf and take the above actions. Their failure to advise Bennett to call for an opening of the estate or examination of Felton pursuant to New York Surrogate's Court Procedure Act, section 222, N.Y. SCPA (SCPA) (McKinney 1967) was a gross breach of duty to Adam. (Complaint, § 137.)

Count III alleges privity of contract between James Bennett and the firm and "they thereby incurred a duty to Adam to competently and diligently perform their duties as attorneys for Bennett." (Complaint, ¶ 142.) They failed to perform this duty to determine whether the rules of the SCPA were complied with by, inter alia, assuring that the guardian ad litem performed his duties. (Complaint, ¶ 148.) Bennett and

his assistants breached their duty to Adam by failing to obtain independent appraisals on the 48th and 53rd Street properties. James Bennett and his firm breached their duties by failing to instruct Bennett to have such an appraisal completed. (Verified Complaint, ¶ 148.) Bennett breached his duty by not fully reviewing all the accounts. (Complaint, ¶ 154.) Bennett, James Bennett, and the firm failed in their duty to protect Adam's interests by allowing the estate to be closed and in not calling for an opening of it in the face of Felton's and Dreyer and Traub's improprieties. (Complaint, ¶ 151.) Finally, Bennett, his assistants, James Bennett, and the firm breached their duty to Adam by not objecting to the rulings of the court. (Complaint, ¶ 153.)

Count IV alleges that Bennett, James Bennett, and the firm breached their duties to Adam as fiduciaries/attorneys by failing to act in his best interests, "failing to take any actions whatsoever to recover the Estate assets that were misappropriated by Felton and Dreyer and Traub, and failing to, at the very least, bring said activities to the attention of the Court." (Verified Complaint, ¶ 168.) The damage to Adam is the damage caused to the estate -- lack of discovery of the improprieties, and thus lack of recoupment of estate losses. (Complaint, ¶ 163.)

Count V is directed to John Bennett's own negligence. According to this count, he breached his fiduciary and legal duty by "negligently hiring" James Bennett and the firm as his attorneys. (Complaint, ¶ 169.) Count VI alleges

that James Bennett and the firm committed gross malpractice by failing to adequately counsel Bennett. (Complaint, ¶ 176.) The complaint also alleges that James Bennett and the firm breached "their fiduciary duty of loyalty by acting in Adam's behalf under conflicts of interest." (Complaint, ¶ 178.) This negligent conduct amounted to attorney malpractice and violated the Rules of Professional Conduct. (Complaint, ¶ 178.)

Count VII alleges attorney malpractice against James Bennett and his firm in that they had a duty to review John Bennett's reports and ensure that they "correctly characterized Adam's interest under the will." (Complaint, ¶ 185.) They also had an implied duty to advise the guardian and determine that the guardian supplied the court with all

pertinent information. Their duty also included ensuring that the SCPA was followed. (Complaint, ¶ 186-87.) Adam suffered damages as a result of these duties being breached. (Complaint, ¶ 180.)

The last count alleges that John Bennett breached his fiduciary duty to Adam by failing to disclose the conflicts of interest that existed. He also breached this duty, according to the complaint, by failing to note in the reports the many acts of fraud committed. (Complaint, ¶ 193-94.) In addition, he breached this duty by failing to obtain appraisals for the 48th and 53rd Street properties and by failing to disclose this failure. (Complaint, ¶ 195.) As a result, Adam has suffered damages "via the hundreds of millions of dollars of losses suffered by the Estate."

(Complaint, ¶ 196.) This same description of the harm suffered by Adam was stated in Counts I, II, III, V, VI, and VII.

The complaint was filed on November 2, 1989, and the amended complaint was filed November 21, 1989. In a petition dated October 20, 1989, brought on by order to show cause dated October 23, 1989 and returnable October 30, John Bennett sought from the Surrogate's Court construction, advice, and direction regarding his wards' interest in income, as distinct from principal, under the will as the issue relates to the proceedings involving an accounting for the period May 1, 1979 to December 31, 1985. (Def. Ex. X.) In an interim report filed with the Surrogate's Court on November 29, 1989, he seeks additional guidance from the court on two issues:

whether he should recuse himself as guardian in light of the instant suit; and whether he should now assert claims against the parties whose actions might, if the current allegations and admissions are true, result in "a surcharge or judgment which would benefit the interests of my wards." (Def. Ex. W, pp. 1-2.) John Bennett believed he was "ethically obligated to seek this advice because, otherwise, there might be an appearance of impropriety in my continuing to represent Adam Sommer after he sued me." (John Bennett Aff. dated Jan. 24, 1990, ¶ 3.) Bennett also believed that Adam's interests could be protected if some other person knowledgeable in estate affairs was appointed to replace him. Finally, Bennett "felt that [he] could only continue to serve as guardian ad litem if

such continued service was sanctioned by the Surrogate himself. (John Bennett Aff. dated Jan. 24, 1990, ¶ 3.)

With regard to the pleadings, John Bennett noted that the underlying proceedings concern Viola Sommer's petition to set aside a decree which settled the account of herself and Murray Felton, as executors of the estate, for the period May 1, 1979 to December 31, 1985. (Def. Ex. W, p. 3.) Because of this time span, it was important to maintain the "clear difference between the future contingent interest that my wards have in income after the death of their respective parents, as distinct from the past income, which is the area subject to dispute." (Def. Ex. W, p. 4.) He then proceeds to analyze the interest of the wards under the will and concludes that if there is a reopening and

surcharge, the income would go to Viola Sommer and the adult children.

Because of the history of delay surrounding the depositions and discovery, "a refusal of certain parties to be deposed or to provide any documentary support for allegations, a factor of advanced age of certain of the parties, and the possible running of the statute of limitation," Bennett sought the court's advice with regard to filing a pleading. (Def. Ex. W, p. 11.) Later in his report he states:

> A reading of the pleadings and admissions by Viola Sommer and Jack Sommer indicates that, if true, Viola Sommer has given general releases and indemnity which might bar her claims against Respondents. Due to this possibility, she demands the Guardian ad Litem proceed

with a course of action which will principally benefit her and the adult members of the Sommer family, not my Wards, and which may put at risk benefits now held by my Wards. A review of the pleadings indicates a possible claim against not only Murray Felton and Dreyer & Traub, but also against the Petitioner, Viola Sommer, as well as Trustee Jack Sommer, for self-dealing, for improper releases, for being part and parcel of many of the alleged surchargeable offenses she alleges against Murray Felton, and for the possible surrender of valuable rights in exchange for the appointment of Jack Sommer, as Successor Trustee to Trustee Murray Felton. The aforesaid actions, which are set forth in the allegations and admissions, if true, present the specter of a secret

deal which might have been to the detriment of my Wards and a secret deal in which Murray Felton, Dreyer and Traub, Viola Sommer and Jack Sommer were allegedly all active participants. This secret deal was never revealed to the Guardian nor the Court until Petitioner filed her petition to reopen. It can be argued that they seek to gain from their own possible wrongdoing what they are not entitled to. If there is a reopening and surcharge, the surcharges insofar as income (in my opinion) clearly go to Viola Sommer and the adult children. My Wards get no benefit, as their interest is a contingent interest in <u>future</u> income. If principal is surchargeable, my Wards would benefit <u>but</u>, there is a power to collapse the trust and pay all principal to

> Viola Sommer at the discretion of the "independent" Trustee. The Guardian ad Litem's duties require him to protect his Wards, not only with regard to Felton and Dreyer and Traub, but also with regard to alleged and admitted actions of Petitioner, Viola Sommer, as well as Jack Sommer, a Trustee, all of whom were originally part and parcel of the secret deal not revealed to the Guardian or to the Court as evidenced by the secret proposed objections of December 14, 1984 (HDL Memo [Exhibit "A"]) and the conspiratorial settlement thereof of December 19, 1984 (Exhibit "B").

(Def. Ex. W, pp. 11-13.)

In addition, he notes that on behalf of the wards he has potential claims against Jack Sommer and Viola Sommer as

co-conspirators in the secret deal to cover up the wrongdoing of Felton and Dreyer and Traub in exchange for "the consideration of Murray Felton resigning as trustee and Jack Sommer being appointed as trustee and Viola receiving a release from Felton." (Def. Ex. W, p. 13.) Viola admitted she sold principal assets at prices far below fair market value; she gave general releases worth millions to Felton and Dreyer and Traub. Jack Sommer, if the allegations are true, should possibly be removed as a trustee. Finally, Laura Sommer avers that millions of dollars in estate funds have been spent in legal fees. As a guardian, Bennett states that he must question this and "request permission to make inquiry as to the source of payment of said funds to make certain that funds in which my wards have an interest are not wasted."

(Def. Ex. W, pp. 13-14.)

Since the filing of the complaint in federal court, Viola Sommer made a motion for a change of venue of the nonjury trial ordered on her petition to set aside the final accounting. In a decision and order dated November 1, 1989, Judge Harrington denied the motion as a matter of discretion. (Def. Ex. Y.) In denying the motion, which was apparently based on the misconduct of various judges, justices, and attorneys in Nassau County, Judge Harrington warned the counsel and litigants "that repetition of the following baseless accusations in any other papers filed in this proceeding will result in the imposition of sanctions." He then lists the parties against whom judicial misconduct charges are made: Murray Felton, Justice Leo McGinity, and his own

court, as well as various other baseless accusations directed at the court and legal system. In concluding he states, "All the parties to this litigation could benefit by less vitriolic language and particularly the attorneys should exercise more discretion in the use of the invective." (Def. Ex. Y, Order dated Nov. 1, 1989, pp. 9-10.)

This order was appealed by Viola Sommer to the Supreme Court of the State of New York, Appellate Division, Second Department. On November 20, 1989, the Appellate Division issued a decision and order granting a stay of the trial or hearing pending the determination of the appeal. A stay was denied insofar as it pertained to all discovery. (Def. Ex. Y.)

On December 16, 1989, John Bennett suffered a stroke which placed his health

in considerable jeopardy. He was advised by his physicians to rest and avoid unnecessary stress. James Bennett advised the Surrogate of his father's health problems, and the Surrogate permitted John Bennett to resign. (John Bennett Aff. dated Jan. 24, 1990, ¶ 4.) On December 26, 1989, the Surrogate appointed Ira Lustgarten as guardian ad litem. (Def. Ex. A to Bennett Aff. dated Jan. 24, 1990.) Bennett sent the new guardian a transfer report and final report. (Def. Ex. B & C to Bennett Aff. dated Jan. 24, 1990.) Bennett makes two other points in his affidavit regarding the new guardian. First, since he reserved his rights as guardian to examine Felton, Viola Sommer, and Dreyer and Traub, the new guardian has the benefit of this reservation and can act on it. (Bennett Aff. dated Jan. 24,

1990, ¶ 6.) Second, he notes that the successor guardian, in his presentation to the Surrogate, agreed with Bennett's determination that the best course of action would be to follow the orderly procedure laid down by the Surrogate and that the interests of the wards was a "contingent interest in principal and a contingent interest in future income." (Bennett Aff. dated Jan. 24, 1990, ¶ 7; Def. Ex. D, transcript of Lustgarten presentation to the Surrogate, pp. 31-32.)

C. Background of Disqualification Motion

In 1982, John J. Bower, Esq., a name partner of the law firm representing the defendants, was appointed as a member of the New York Commission on Judicial Conduct. (McCauley Aff., ¶ 3.) On December 15, 1989, the membership of the commission elected him to the post of

Chairman. (Bower Aff., ¶ 4.) His term as a member of the commission expired at the end of March 1990. He was reappointed for an additional four-year term but declined such reappointment. (Gurren letter filed April 16, 1990.)

In September 1989, the commission received a complaint made by Laura Sommer against Surrogate Radigan (Bower Aff., ¶ 6.) In August 1989, Gregory M. McCauley, Esq., the plaintiff's attorney, appeared before the commission and was subject to extensive questioning. (McCauley Aff., ¶ 2.) According to McCauley, during the questioning he "related detailed information . . . that is non-discoverable work produce and privileged information including case strategy." (McCauley Aff., ¶ 2.) In addition, other counsel appeared and testified when Laura Sommer initiated her complaint.

(McCauley Aff., ¶ 2.) Finally, McCauley states that Bower is involved in litigation "with regard to certain fees. It is my understanding that he is represented in that action by Nancy Ledy-Gurren, Esq., who is lead counsel in the present action." (McCauley Aff., ¶ 4.)

In his affidavit, Bower describes the structure of the commission, whose powers are established by the New York State Commission, Article 6, section 22(a). According to Bower, since "the Commission is a 'one tier' body, its investigative and adjudicative functions are carefully separated." (Bower Aff., ¶ 4.) The commission has an administrator and a paid staff consisting of a deputy administrator, staff attorneys, investigators, and other staff who receive, process and, subject to commission approval, investigate and

prosecute complaints against members of the judiciary. (Bower Aff., ¶ 4.) Commission members do not investigate or prosecute a complaint. Rather, they decide whether to dismiss a complaint or order an investigation; upon completion of an investigation, whether to dismiss a complaint or authorize the service of a formal complaint; and if a formal complaint is authorized, they will appoint a referee to hear and report. Upon receipt of the referee's report, the Commission sits as an appellate panel to either confirm or disaffirm the referee's findings. (Bower Aff., ¶ 4(d)). The panel then renders a judgment, which is forwarded to the New York Court of Appeals and which becomes final absent an appeal. (Bower Aff., ¶ 4(d)). He notes that at "no time from the authorization to serve a formal complaint until after

the receipt of the referee's report" do the commission members "have access to any of the investigatory material." (Bower Aff., ¶ 5.)

Thus, the only material regarding the investigation of the Radigan complaint that Bower might have had access to is "certain portions of the original complaint and the investigation" so that the commission could determine whether to proceed or dismiss the complaint. (Bower Aff., ¶ 5.) Regarding the initial complaint made by Laura Sommer in September 1989, Bower states he was not at that monthly meeting and "was not privy to any information disclosed in connection with the complaint." (Bower Aff., ¶ 6.) In addition, early in November Bower's firm was contacted with respect to defending the present action. According to Bower, "From these contacts,

I was informed that, in fact, a complaint had been made by Laura Sommer against Surrogate Radigan." (Complaint, ¶ 6.) Bower recused himself by letter dated November 15, 1989. (Ex. A to Bower Aff.) The letter is addressed to the Administrator of the Commission, Gerald Stein, Esq. Accordingly, Bower has neither seen nor heard anything further concerning the complaint. (Bower Aff., ¶ 6.) In addition, he "will not and cannot participate in any aspect" of the complaint. (Bower Aff., ¶ 6.) Finally, he notes that because of the "careful separation of findings between the Commission members on one hand and the administrator and his staff on the other, there has been a wall erected between the investigatory and prosecutorial functions of the Commission and Commission members, who will exercise an adjudicatory role on

the merits of the matter." (Bower Aff., ¶ 7.)

On January 24, 1990, McCauley sent a letter to the commission complaining that Bower was breaching the confidentiality of the commission and giving the appearance of impropriety by sitting on the commission while the Radigan complaint was brought. The letter also alleges conflicts of interest. (Ex. B to Bower Aff.)

Stern responded in a letter dated January 31, 1990. He states, "The fact is that Mr. Bower disqualified himself more than ten weeks ago from the matter . . . . Also, on the only occasion that the commission considered your client's allegations -- when they were first received -- Mr. Bower was not present. To date, only . . . and a staff attorney have seen any materials from you. The

commission members have not seen your materials." (Ex. C to Bower Aff., p. 1.) Stern's letter also states that the confidentiality of the commission proceedings inured to the judge's benefit, and that McCauley's statement that he "testified" before the commission is inaccurate since the complaint had not reached the formal stage. (Ex. C to Bower Aff., p. 2.)

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate when the pleadings, depositions, admissions, answers to interrogatories, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The nonmovant's evidence is to be believed, and all ambiguities and

inferences to be drawn from the underlying facts should be resolved in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Brady v. Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988).

Fed. R. Civ. P. 56(e) specifies that affidavits in opposition to a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). This rule makes clear "that a party cannot rest on the allegations contained in [the] complaint in opposition to a properly supported summary judgment motion." First National Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 289 (1968). The mere pleadings

themselves are not a basis for opposing summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

The moving party has the heavy burden of establishing the absence of a genuine issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Katz v. Goodyear Tire & Rubber Co., 737 F.2d 238, 244 (2d Cir. 1984). The substantive law identifies which facts are material. Anderson, supra, at 248. To demonstrate the absence of a "genuine" issue of material fact, the movant must normally present evidence that taken by itself would entitle the movant to a directed verdict. Id.; Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1971) (quoting Radio City Music Hall Corp. v. United States, 135 F.2d 715, 718 (2d Cir. 1943)). The court should resolve any doubt as to the existence of

a material fact in favor of the nonmovant. Brady, supra, at 210.

When the movant moves in respect to an issue on which the nonmoving party has the burden of proof, the movant may discharge this burden by showing "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., supra, at 325. Once the movant has "attempted to demonstrate that the nonmoving party's evidence is insufficient as a matter of law to establish a claim, Brady, supra, at 211, the burden shifts to the nonmoving party to demonstrate that the claim is not implausible, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The court must "proceed very cautiously" in evaluating the sufficiency of the nonmoving party's evidence.

Brady, supra, at 211. Summary judgment cannot be granted if there is "any evidence . . . from any source" from which a reasonable inference in favor of the nonmovant may be drawn. Brady, supra, at 211 (quoting In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 258 (3d Cir. 1983), rev'd on other grounds sub nom. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)). In addition, summary judgment regarding standing should be entered only if the moving party has demonstrated that the allegations in the complaint "were shown and raised no genuine issue of fact." United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 (1973); Paton v. La Prade, 524 F.2d 862, 867 (3d Cir. 1975). See also Alliance of American Insurers v. Cuomo,

854 F.2d 591, 597-98 (2d Cir. 1988).

B. Standing

Article III of the Constitution provides, "The judicial power shall extend to . . . controversies . . . between citizens of different states." U.S. Const. art. III, § 2, cl. 1. Thus, the threshold question in every federal case is determining the power of the court to hear the case. In its constitutional dimension, "standing imports justiciability: whether plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III."[3] Warth v. Seldon, 422 U.S. 490,

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[3]The question of standing also raises the prudential limitations on the exercise of a federal court's power. The prudential limitations are generally directed towards "abstract questions of wide public significance," Warth, supra, at 500, and are not implicated in the instant case.

498 (1975). The question of standing is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial power." Id. at 498-99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976)). The plaintiff himself must have "suffered 'some threatened or actual injury resulting from the putatively illegal action.'" Id. at 499 (quoting Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973)). A plaintiff who seeks federal judicial power must "stand to profit in some personal interest." Simon, supra, at 39. "Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the

Art. III limitation." Simon, supra, at 39.

To establish the requisite personal stake in the controversy that is necessary to insure an "'honest and actual antagonistic assertion of rights' to be adjudicated," which is a "safeguard essential to the integrity of the judicial process," Poe v. Ullman, 367 U.S. 497, 505 (1961) (quoting United States v. Johnson, 319 U.S. 302, 305 (1943), a plaintiff must establish that he has suffered a "distinct and palpable injury to himself," Warth, supra, at 100, that "is likely to be redressed if the requested relief is granted." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (citing Simon, supra, at 38). There must also be a "'fairly traceable' causal connection between the claimed injury and the challenged

conduct." Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978) (citing Simon, supra, at 41-42; Linda R. S., supra, at 617); see Peoples Gas, Light and Coke Co. v. United States Postal Service, 658 F.2d 1182, 1194 (7th Cir. 1981). These elements of standing, if met, "assure that concrete adverseness which sharpens the presentation of issues," Baker v. Carr, 369 U.S. 186, 204 (1962), necessary for adjudication of issues. United Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1947).

C. Ripeness

Ripeness is another aspect of justiciability and it is related to the question of standing, specifically to the existence of a distinct and palpable injury. Warth, supra, at 499 n.10; Pence v. Andrus, 586 F.2d 733, 737 (9th Cir.

1978). Both doctrines "prevent courts from becoming enmeshed in abstract questions which have not concretely affected the parties." Pence, supra, at 737.[4]

Distinct from standing, which focuses on the plaintiff, ripeness focuses on the claims presented. "[R]ipeness is peculiarly a question of timing." Blanchette v. Connecticut General Insurance Corps., 419 U.S. 102, 140 (1974). In considering whether the claim is ripe, the court must evaluate

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[4] Like the standing doctrine, the ripeness doctrine also reflects nonconstitutional principles in its elements of discretionary policy reasons for refusing jurisdiction. See Bergstrom v. Bergstrom, 623 F.2d 517, 519 (8th Cir. 1980) (citing C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 3532 at 237-38 (1975); Blanchette v. Connecticut General Insurance Corps. 419 U.S. 102, 138 (1974)). These policy reasons are not present in the instant case.

the "fitness of the issue for judicial decision and the hardship of the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967); Johnson v. Stuart, 702 F.2d 193, 196 (9th Cir. 1983); Commonwealth Edison Co. v. Train, 649 F.2d 481, 484 (7th Cir. 1980). The "central concern" in the ripeness inquiry "'is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." Metzenbaum v. Federal Energy Regulatory Commission, 675 F.2d 1282, 1289-90 (D.C. Cir. 1972) (quoting C. Wright, A. Miller & E. Cooper, 13 Federal Practice and procedure: Jurisdiction § 3532, at 237-38 (1975)); see Rhodes v. Laurino, 601 F.2d 1239, 1241 (2d Cir. 1979) (Challenge to state statute permitting adoptee to

obtain access to sealed records "for good cause shown" not ripe since Surrogate's Court had not determined the plaintiff did not present good cause). See also Atlanta Gas Light Co. v. United States Department of Energy, 666 F.2d 1359, 1370 (11th Cir.) cert. denied, 459 U.S. 836 (1982); Monahan v. Nebraska, 687 F.2d 1164, 1168 (8th Cir. 1982), cert. denied, 460 U.S. 1012 (1983); Hometown Co-operative Apartments v. City of Hometown, 515 F. Supp. 502, 504 (E.D. I11. 1981); Halleck v. Berliner, 427 F. Supp. 1225, 1250-51 (D.D.C. 1977).

Adam's Interest

It is undisputed that Adam has an contingent remainder interest in the Article Six Trust principal. (Aff. of

Bennett, ¶ 10-11; Aff. of Newman, ¶ 5)[5] He also has a contingent remainder interest in future income; that is, he has an interest in income only once it is no longer paid to Viola Sommer or her three children under the terms of the Article Six Trust. Adam's interest is recognized and protected by New York Law. See, e.g., N.Y. Estates, Powers and Trust Law, § 6-1.1 (McKinney 1967); N.Y. Real Property Actions and Proceedings Law, §§ 811, 831 (McKiney 1979). However, Adam does not have an interest in past income. By definition, he has no interest in what, under the terms of the will, has

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[5]Newman avers that Adam has a vested remainder interest in approximately $1,000,000 of principal. (Newman Aff., ¶ 5). However, he refers the court to sources that do not bear out this statement. He must, therefore, be referring to the trust of one million dollars established by Bennett through a settlement with Viola Sommer. See Def. Ex. I, pp. 3-4.

already been paid to the income beneficiaries or their designees. In the estate accounting proceedings which are the subject of this lawsuit, which began on May 1, 1979 and ended of December 31, 1985, only past income is at issue, save the $1,840,750 in paid commissions that were charged against principal and the alleged undervalued sale of the 48th and 53rd Street properties. (Def. Ex. H, p. 75; Aff. of Bennett, p. 11.) Adam has no standing to raise claims implicating past income since he has no interest in it and cannot show threatened or actual injury to himself.

Adams's interest in principal is implicated by four counts of the complaint: Count I, which alleges that the defendants intentionally and fraudulently failed to have an independent appraisal (¶ 115, 121, 122,);

Count III, which alleges that James Bennett and the firm breached their statutory duty by failing to obtain appraisals on the 48th and 53rd Street properties and by failing to call for an opening of the estate (¶ 148, 149); Count IV, which alleges that the defendants were negligent in failing to take action to recover assets that were misappropriated by Felton, which can be generously read to include the failure to question the commission agreement (¶ 160-162); and Count VIII of the complaint, which alleges that John Bennett breached his fiduciary duty to question "the many acts of fraud or other improprieties committed by Felton and Dreyer and Traub," as well as his failure to obtain appraisals for the 48th and 53rd Street properties (¶ 194-195).

Adam may have standing to raise

these claims since they involve injury to his interest in principal. However, this injury is not yet distinct and palpable: it hinges on uncertain and contingent future events that may not occur or may not occur as anticipated. The allegations regarding the defendants' failure to recover assets misappropriated by Felton and to question the fraud committed by Felton, and Dreyer and Traub (Counts IV and VIII) are contingent upon several uncertain events: the opening of the estate based upon Viola Sommer's coercion; a finding of fraud once the estate is opened; and the failure of the current guardian ad litem to assert the rights reserved by John Bennett. Once these events occur, then Adam's interest in the commission paid to Felton is injured, and the controversy is presented in concrete terms for adjudication. Then

the court can determine whether the defendants breached their duties to Adam. Regarding the 48th and 53rd Street properties, the analysis is the same, with the added observation that the properties were sold before the guardian was appointed. Since it is too soon to reach the issues of the defendants' fraud, negligence, and breach of common-law and statutory duties, these claims are not fit for judicial decision. In declining to exercise jurisdiction, the court notes that its decision does not impose hardship on Adam, who is not currently in a position to take under the will, and whose interests are protected by the guardian ad litem in the Surrogate's Court. Thus, Counts I, III, IV, and VIII are dismissed for lack of ripeness.

D. **The Probate Exception**

Alternatively, the complaint is dismissed under the probate exception to federal subject matter jurisdiction. Federal Courts have jurisdiction "to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate." Markham v. Allen, 326 U.S. 490, 494 (1946) (citations omitted). To determine whether the exercise of jurisdiction will interfere with the probate proceedings, the court must examine whether "under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court; but where the suit merely seeks to enforce a claim inter partes, enforceable

in a state court of general jurisdiction, federal diversity jurisdiction will be assumed." Lamberg v. Callahan, 455 F.2d 1213, 1216 (2d Cir. 1972). See also Giardina v. Fontana, 733 F.2d 1047 (1984). Federal courts will, thus, exercise jurisdiction over suits which arise from or pertain to probate proceedings, "but are independent in character and not merely incidental or ancillary to the probate." Rice v. Rice Foundation, 610 F.2d 471, 476 (7th Cir. 1979) (quoting 1A Moore's Federal Practice § 0.157 [4.-11] at p. 171).

Although the complaint, on its face, appears to frame issues independent from the probate proceedings and directed solely towards the relationship between Adam and the guardian and his attorneys, examining the complaint in terms of justiciability reveals that to force the

claims to ripeness would involve interference with the proceedings in the probate court. To find that the commission agreement was invalid and to determine the existence and scope of Felton and Dreyer and Traub's fraud would dilute the jurisdiction of the Surrogate's Court and interfere with its proceedings under state law. See In re Estate of Johnson, 142 Misc.2d 388, 539 N.Y.S.2d 243 (Surr. Ct. 1988).

E. The motion to Disqualify

It is clear for the affidavits presented by Bower & Gardner that Bower had no access to information that would give the defendants an unfair advantage. At the most, Bower's position may give the appearance of impropriety in violation of Canon 9 of the Code of Professional Responsibility, which provides, "A lawyer should avoid even the

appearance of professional impropriety." However, even if this canon is violated, it has in no way tainted the disposition of the present motion, and is "simply too slender a reed on which to rest a disqualification order except in the rarest cases." Board of Education of New York City v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979). See also Evans v. Artek Systems Corp., 715 F.2d 788, 792 (2d Cir. 1983); Moore v. Marciotta, 581 F. Supp. 649, 652 (E.D.N.Y. 1984) ("Mere access to documents is not a sufficient basis for inferring an attorney-client relationship or knowledge of confidential information.").

The motion to disqualify the law firm of Bower & Gardner is denied.

CONCLUSION

The complaint is dismissed for lack of subject matter jurisdiction. The

motion to disqualify the defendants' counsel is denied.

SO ORDERED.

The Clerk is directed to enter judgement dismissing the complaint.

/s/ Jacob Mishler
U. S. D. J.

APPENDIX E

NEW YORK SURROGATES COURT PROCEEDURE ACT
§ 401. Appearance of parties

1. Who may appear. A party other than an infant, incompetent or conservatee may appear and prosecute or defend a special proceeding in person or by attorney, except that a corporation or voluntary association shall appear by attorney. An infant by the guardian of his property, an incompetent by the committee of his property and a conservatee by his conservator may appear and prosecute or defend a special proceeding in person or by attorney as provided in 402.

2. How made. An appearance is made by pleading by waiver, by serving upon the attorney for the petitioner and filing with the clerk a signed notice of appearance or by appearance in person noted upon the record in open court. The

notice may be signed by any person authorized under subdivision 1 to appear for the party.

3. Evidence of attorney's authority. Where a party is a non-domiciliary or has not been served personally with process within the state the court may require

(a) that any person appearing for the party furnish acknowledged evidence of authority so to appear and

(b) the authorization to set forth whether there has been executed previously by the party

(i) any power of attorney or similar instrument to the party's interest in the estate and

(ii) any assignment of the interest

4. Appearance by waiver of process. Any adult competent party may also appear by an acknowledged waiver of issuance and service of process which upon filing with the clerk is equivalent to the filing of an acknowledged notice of appearance under subdivision 2. In a probate proceeding the waiver shall state the date of the will to which it relates.

5. Termination of appearance of counsul. When a consular official shall have appeared in behalf of an alien, a subsequent appearance by the attorney in fact of the alien pursuant to recorded power of attorney or appearance by an authorized attorney shall terminate the appearance of the consul. L.1966, c.953, amended L.1967, c. 685, § 13.

§ 402. Appearance for infant, incompetent, conservatee or person under disability

1. An infant may appear by the guardian of his property, an incompetent by the committee of his property, and a conservatee by his conservator. The appointment of a guardian ad litem does not bar the guardian, committee or conservator from appearing as a party. The person so appearing and his attorney shall each file on or before the return day of process an affidavit showing

(a) that he is qualified to protect their rights,

(b) whether he is related or connected in business with any party to the proceedings or the attorney for any party,

(c) whether he is entitled to share in the estate in which the infant, incompetent or conservatee is interested or is in any way interested therein,

(d) whether he has any interest adverse to or in conflict with that of the infant, incompetent or conservatee and

(e) such additional facts as may be required by the court.

2. A person under disability shall appear by a guardian ad litem where no appearance is made as provided in subdivision one or where the court so directs because of possible adversity or conflict of interest or for other cause. (As amended L.1971, c. 609, § 1; L.1981, c. 115, § 113.)

§ 403. Appointment of guardian ad litem

1. By nomination. (a) An infant over the age of 14 years or his parent or guardian may petition the court on or before the return day of process for the appointment of a named attorney as his guardian ad litem. There shall be filed with the petition the affidavit of the attorney showing

(i) that he is qualified to protect the rights of the infant and has no interest adverse to him; and

(ii) the circumstances which led to his nomination.

(b) There shall also be filed with the petition the affidavit of the parent with whom the infant resides, or if not residing with a parent, by the person

having his legal custody or an adult person with whom he resides, showing that the affiant:

(i) consents to the appointment of the nominated attorney,

(ii) has no interest adverse to that of the infant and if he has an adverse interest, whether he has influenced the infant in the nomination and

(iii) such additional facts as may be required by the court.

(c) The court may appoint the nominated attorney guardian ad litem unless because of adversity or conflict of interest or for other cause a different appointment is required.

2. By the court. A person under disability who does not appear by his guardian, committee or conservator

pursuant to 402 shall except as otherwise expressly provided appear by a guardian ad litem appointed by the court on nomination or on its own initiative whenever such person is a necessary party or for other reason the court deems it necessary to appoint a guardian ad litem to protect the interests of such party.

3. An appearance for a person under disability by a guardian ad litem is not required and the court may dispense with the same whenever

(a) in an uncontested probate proceeding such person will receive a share equal to or greater than the share to which he would be entitled if decedent had died intestate,

(b) in an accounting proceeding such person receives a specific bequest or a specific devise or a general legacy of a

stated sum of money and the accounting party shows to the satisfaction of the court that such person has received his legacy or devise or will receive same in full under the decree to be made in the proceeding,

(c) in any proceeding the public administrator receives process or notice in behalf of the person under disability. (As amended L.1971, c. 609, § 2; L.1974, c. 904, § 2; L.1981, c. 115, § 114.)

§ 403-a. Proceedings for the commitment of the guardianships and custody of infants; appointment of guardian ad litem

1. The court shall appoint a guardian ad litem to represent an infant in a proceeding for the commitment of the guardianship and custody of such infant

brought pursuant to section three hundred eighty-four-b of the social services law or in a proceeding where a revocation of an adoption consent is opposed under section one hundred fifteen-b of the domestic relations law.

2. As used in this section, "guardian ad litem" refers to an attorney admitted to practice law in the state of New York and designated under this section to represent infants in proceedings for the commitment of the guardianship and custody of such infant brought pursuant to section three hundred eighty four-b of the social services law.

3. (a) The office of court administration may enter into an agreement with a legal aid society for the society to provide guardians ad litem for the surrogate's court in proceedings

brought pursuant to section three hundred eighty-four-b of the social services law in a county having a legal aid society

(b) The appellate division of the supreme court for the judicial department in which a county is located may enter into an agreement, subject to regulations as may be promulgated by the administrative board of the judicial conference, with any qualified attorney or attorneys to serve as guardian ad litem for the surrogate's court in that county in proceedings brought pursuant to section three hundred eighty-four-b of the social services law.

(c) The appellate division of the supreme court for the judicial department in which a county is located may designate a panel of guardians ad litem

for the surrogate's court in that county in proceedings brought pursuant to section three hundred eighty-four-b of the social services law subject to the approval of the administrative board of the judicial conference. For this purpose, it may invite a bar association to recommend qualified persons for consideration by such appellate division in making its designation subject to standards as may be promulgated by such administrative board.

4. (a) An agreement pursuant to paragraph (a) of subdivision three of this section may be terminated by the office of court administration by serving a notice on the society sixty days prior to the effective date of the termination.

(b) No designations pursuant to paragraph (c) of subdivision three of

this section may be for a term of more than one year, but successive designations may be made. The appellate division proceedings pursuant to such paragraph (c) may at any time increase or decrease the number of guardians ad litem designated in any county and may rescind any designation at any time, subject to the approval of the office of court administration.

5. (a) If the office of court administration proceeds pursuant to paragraph (a) of subdivision three of this section, the agreement shall provide that the society shall be reimbursed on a cost basis for services rendered under the agreement. The agreement shall contain a general plan for the organization and operation of the providing of guardians ad litem by the

respective legal aid society approved by the administrative board, and the office of court administration may require such reports as it deems necessary from the society.

(b) If an appellate division proceeds pursuant to paragraph (b) or (c) of subdivision three of this section, guardians ad litem shall be compensated and allowed expenses and disbursements in the same amounts established by section seven hundred twenty-two-b of the county law.

6. The administrative board of the judicial conference may prescribe standards for the exercise of the powers granted to the appellate divisions under this section and may require such reports as it deems desirable.

7. The cost of guardians ad litem under this section shall be payable by the state of New York within the amounts appropriated therefor.

8. Upon an appeal in a proceeding brought pursuant to section three hundred eighty-four-b of the social services law, the court to which such appeal is taken, or is to be taken, shall appoint a guardian ad litem to represent the infant, in accordance with the provisions of this section.

(Added L.1977, c. 859, § 2; amended L.1986, c. 817, § 5.)

§ 404. Qualifications and duties of guardian ad litem

1. A guardian ad litem shall be an attorney admitted to practice in New York.

2. Before entering upon his duties he shall file a consent to act and unless he has previously done so, a statement of no interest adverse to or in conflict with the person under disability.

3. He shall file an appearance and take such steps with diligence as deemed necessary to represent and protect the interests of the person under disability, and file a report of his activities together with his recommendation upon the termination of his duties or at such other time as directed by the court.

(As amended L.1968, c. 259, § 6, eff. May 14, 1968.)

§ 711. Suspension, modification or revocation of letters or removal for disqualification of misconduct

In any of the following cases a creditor or person interested, any person in behalf of an infant or any surety on a bond of a fiduciary may present to the court having jurisdiction a petition praying for a decree suspending, modifying or revoking those letters and that the fiduciary may be cited to show cause why a decree should not be made accordingly:

1. Where the respondent was, when letters were issued to him, or has since become ineligible or disqualified to act as fiduciary and the grounds of the objection did not exist or the objection was not taken by the petitioner or a person whom he represents before the letters were granted.

2. Where by reason of his having wasted or improperly applied the assets of the estate, or made investments unauthorized by law or otherwise improvidently managed or injured the property committed to his charge or by reason of other misconduct in the execution of his office or dishonesty, drunkenness, improvidence or want of understanding, he is unfit for the execution of his office.

3. Where he has wilfully refused or without good cause neglected to obey any lawful direction of the court contained in any decree or order or any provision of law relating to the discharge of his duty.

4. Where the grant of his letters was obtained by a false suggestion of a material fact.

5. Where by the terms of a will, deed or order, his office was to cease upon a contingency which has happened.

6. Where he has filed without sufficient reason to notify the court of his change of address within 30 days after such change.

7. Where he has removed property of the estate without the state without prior approval of the court.

8. In the case of an executor who has not been required to give a bond, where he does not possess the degree of responsibility required as a fiduciary.

9. In the case of a guardian, where he has removed or is about to remove from the state or where the interests of the infant will be promoted by the appointment of another person as guardian.

10. In the case of a testamentary trustee, where he has violated or threatens to violate his trust or is insolvent or his insolvency[1/] is apprehended or is for any other cause deemed an unsuitable person to execute the trust. L.1966, c. 953, amended L.1967, c. 685, § 34.

11. In the case of a lifetime trustee, a creditor or a person in behalf of an infant or any surety on a bond of the trustee may present to the court having jurisdiction a petition praying for a decree removing the trustee or suspending or modifying his appointment and that the trustee may be cited to show cause why a decree should not be made accordingly where the supreme court, if

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[1/]So in original. Probably should read "insolvency".

it had jurisdiction, would have cause to remove the trustee or to suspend or modify his appointment.

(As amended L.1980, c. 503, § 10).

NEW YORK REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

§ 6-1.1 Estates classified

(a) Estates in property as to duration are classified as follows:

(1) Fee simple absolute.

(2) Fee on condition.

(3) Fee on limitation.

(4) Estates for life.

(5) Estates for years.

(6) Estates from period to period.

(7) Estates at will.

(8) Estates by sufferance.

L.1966, c. 952, eff.Sept. 1, 1967.

§ 811. Action for waste by heir, devisee or grantor of reversion

An heir or devisee may maintain an action for waste, committed in the time of his ancestor or testator, as well as in his own time. The grantor of a reversion may maintain an action for waste committed before he aliened the same.

L.1962, c. 142; amended L. 1963, c. 117, § 3.

§ 831. Action by reversioner or remainderman

A person seized of an estate in remainder or reversion may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years.

L.1962, c. 142.

NEW YORK ESTATES POWERS AND TRUSTS LAW

§ 11-2.1 Principal and income

(b) What is income and what is principal; definitions.

(1) Income is the return in money or property derived from the use of principal; including return received as:

(A) Rent from property, including sums received for the cancellation or renewal of a lease.

(B) Interest on money lent, including sums received as consideration for the privilege of prepayment of principal except as provided in paragraph (f) on bond premium and discount.

(C) Income earned during the administration of a decedent's estate, as provided in paragraph (d).

(D) Corporate distributions. as provided in paragraph (e).

(E) Accrued income on bonds or other obligations issued at a discount, as provided in paragraph (f).

(F) Receipts from principal used in business, as provided in paragraph (g).

(G) Receipts from disposition of natural resources, as provided in paragraphs (h) and (i).

(H) Receipts from other principal subject to depletion, as provided in paragraph (j).

(I) Receipts from disposition of underproductive property, as provided in paragraph (k).

(c) When right to income arises; apportionment of income or other receipt.

(1) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an asset

becomes subject to the trust. In the case of an asset which becomes subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

(2) In the case of a decedent's estate, a testamentary trust or an asset received under a will by a trustee: (A) receipts due but not paid at the date of death of the testator are principal; (B) receipts in the form of periodic payments (other than corporate distributions to stockholders and savings bank and savings and loan association dividends) such as rent, interest or annuities payable from any source, not due at the date of death of the testator, shall be treated as accruing from day to day. That portion

of such a receipt accruing before the date of death is principal and the balance is income.

(3) In all other cases any receipt from an income producing asset is income even though the receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.

(4) On termination of an income interest, the income benef
iciary whose interest is terminated or his estate is entitled to: (A) income undistributed on the date of termination; (B) income due but not paid to the trustee on the date of termination; (C) income in the form of periodic payments (other than corporate distributions to stockholders and savings bank and savings and loan association dividends) such as

rent, interest or annuities, not due on the date of termination, accrued from day to day.

No. 91-419

IN THE

Supreme Court of the United States

October Term, 1990

ADAM SOMMER, an infant, by Laura Sommer, his mother, individually in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, Deceased,

Petitioner,

against

JOHN D. BENNETT, ESQ., individually and as Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau, for ADAM SOMMER,

and

JAMES D. BENNETT, ESQ., individually and in his capacity as Attorney for JOHN D. BENNETT, ESQ., Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

and

JAMES D. BENNETT, ESQ., ROBERT J. PAPE, ESQ., GEORGE F. RICE, ESQ. and RICHARD J. SCHURE, ESQ. d/b/a BENNETT, PAPE, RICE & SCHURE, in their capacity as Attorneys for John D. Bennett, Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau, for ADAM SOMMER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to Petition for a Writ of Certiorari

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to Petition for a Writ of Certiorari

Statement of the Case

A. Nature of the Case.

In this diversity action, petitioner Adam Sommer, a contingent beneficiary under the will of his grandfather, seeks to recover damages and surcharges against: (1) John Bennett, the Guardian Ad Litem ["Guardian Bennett" or "Guardian"] appointed to represent the Sommer grandchildren in proceedings to settle the Executors' account of the Estate of Sigmund Sommer ["Estate"] and (2) the Guardian's attorneys, the firm of Bennett, Pape, Rice & Schur ["Bennett Firm"] [D 1-2].* Petitioner alleges that the Guardian, and his counsel, breached various duties to the infant ward, by failing to properly detect, uncover and remedy defalcations of duty, and consequent waste of the Estate's assets, by one of the Estate co-executors, Murray Felton ["Felton"].

In the district court, respondents moved to dismiss the action in its entirety for lack of subject matter jurisdiction, the failure to join necessary parties and a failure to state cognizable damage claims, and requested that the motion be treated as one for summary judgment [D 2-3]. The district court (Mishler, J.) converted the 12(b)(6) motion into one for summary judgment pursuant to the provisions of Fed.R.Civ.P.12 [D 3]; by order and judgment entered September 24, 1990 [C 1-2], Judge Mishler granted accelerated judgment on the grounds of a lack of justiciability (for lack of standing and ripeness), and alternatively dismissed upon the probate exception to diversity jurisdiction [C 2, D 1-86].

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*All parenthetical references preceded by the letters "A", "B", "C" or "D" refer to the Appendices contained in the Petition.

Petitioner then appealed to the Second Circuit Court of Appeals, which, by summary order dated April 19, 1991 [B 1-4], affirmed the decision on the specific bases of a lack of standing and ripeness, as delineated in the district court's opinion. [B 3] This petition for a writ of certiorari follows.

Petitioner defines three infirmities in the Circuit Court's order which purportedly merit review by this Court: (1) that the affirmance creates conflicting authority among the Circuits with respect to the probate exception to diversity jurisdiction; (2) that the Second Circuit applied the principles of standing and ripeness in a manner inconsistent with this Court's decisions; and (3) that the order sanctioned a departure from the accepted and usual course of judicial proceedings. In fact, each such claim is meritless; the petition constitutes no more than an exercise in reargument.

B. Statement of Facts

This lawsuit, which purports to assert a variety of tort and statutory claims against the Guardian and his counsel, has as its genesis events occurring during the probate of the Estate of Sigmund Sommer. In fact, this action is but the latest installment in a vigorous, and on-going, dispute between the Sommer family and one of the Estate's executors, Murray Felton—a dispute which, as noted by the district court, has long-occupied the resources of the Surrogate's Court in Nassau County.[1]

Petitioner's recitation of the facts [Petition pp. 3-27] is a skewed version of the events which finds little support in the record. While there are persistent vitriolic attacks on the parties, [*id.* at 5, 9-10], the former Estate Executors [*id.*

[1]In fact, the district court, obviously overwhelmed by the quantity of proceedings initiated by the Sommer family, aptly chose to entitle the rendition of prior procedural history as "Bleak House" [D 23].

at 20], the New York State Court system [*id.* at 52-53] and respondent's counsel [*id.* at 51], there is no attempt to accurately delineate the prior proceedings or the decisions below. The inaccuracies of petitioner's version of the facts require a complete recitation of the events, so as to manifest the utter lack of merit of petitioner's request for the issuance of a writ of certiorari.

1. The Amended Complaint

The accusatory pleading alleges fraud [Count I], breach of statutory duties [Counts II and III], negligence [Counts IV, V, VI and VII] and breach of fiduciary duty [Count VIII] [D 37]. The gravamen of the charges is that the Guardian Bennett, and the Bennett Firm, breached their duty to the petitioner by failing (either deliberately or negligently), during the course of Estate proceedings, to recognize or remedy improprieties committed by the co-executor Felton and his counsel, the law firm of Dreyer and Traub ("D&T") [D 37-49]. The amended complaint recites a litany of wrongdoings by Felton and D&T, occurring *prior* to Guardian Bennett's appointment, including: (1) the improper sale of two real estate proprieties for less than actual value [D 42]; and (2) breaches of Felton's fiduciary duties through self-dealing and the misappropriation of Estate assets [D 46]. Petitioner avers that such conduct on the part of Felton and D&T deprived the Estate of millions of dollars in assets and income [D 48].

The charges against Guardian Bennett and his counsel, while quite prolix, reduce themselves to the fundamental claims that the Guardian: (1) failed to detect and uncover, in his review of the settlement of the Executor's account, the *prior* misdeeds of Felton and D&T; (2) filed misleading, or perjurious, reports to the Surrogate which improperly led to the probate court's closing of the Estate; (3) failed to disclose conflicts of interest of the Guardian, his assistants

and his counsel, which compromised the fidelity of such representatives to Adam Sommer; and (4) failed to take action, in the face of information as to improprieties by Felton and D&T, to reopen the Estate and thus recapture lost Estate assets [D 37-49]. While petitioner's counsel works hard to disassociate the claims in this action from the probate proceedings, it is manifest that the two are inextricably bound. Only matters yet to be determined by the probate court will serve to define, crystallize, establish or disaffirm the claims here. It was this recognition that properly led the district court and the Circuit Court to conclude that this action lacked justiciability.

2. The Infant-Petitioner's Interest Under the Sommer Will.

Sigmund Sommer died on April 30, 1979 [D 4], and was survived by his widow, Viola Sommer, and three children: Jack Sommer, Susan Sommer Schweitzman and Barbara Sommer Fisher [D 4]. On the date of death, Sigmund Sommer was also survived by seven grandchildren, one of whom is petitioner [D 4].

The Sommer Will [D 5] dated April 3, 1977, controlled the disposition of the decedent's property, and appointed Viola Sommer, Felton and Bankers Trust Company as executors and trustees [D 5]. The Will also designated D&T as attorneys for the Estate and the Trusts [D 5].

The Will created two trusts [D 5]. The first, contained in the Fifth Article (hereinafter "Article Fifth Trust"), established a marital deduction trust in favor of Viola Sommer, with the principal payable, upon the death of the widow, pursuant to a general power of appointment to be exercised in the Will of Viola Sommer [D 6].

The second trust, contained in the Sixth Article [hereinafter "Article Sixth Trust"] established a trust, consisting of the rest, residue and remainder of Sigmund Sommer's Estate [D 6]. The income of that trust was to be distributed, in the sole discretion of the trustees other than Viola Sommer, annually to Viola Sommer and to the three adult Sommer children, per stirpes [D 6]. Pursuant to the terms of this trust, income was to be distributed to grandchildren *if and only if* one of the Sommer children died [D 6-7]. Upon the death of Viola Sommer, the principal of the trust was to be distributed pursuant to the Seventh Article of the Will [D 7].

Under the Seventh Article, the grandchildren possess a contingent remainder interest in the *principal* of the Article Sixth Trust [D 8, 78]. With regard to income, they possess a contingent future interest: for trust income of the Article Sixth Trust to go to a grandchild, one of the Sommer children must die [D 8, 79]. This is an important recognition because at the time of all of Felton's and D&T's activities and conduct, Viola Sommer was (and is still) alive and none of Sigmund and Viola's children were (or are) deceased. Accordingly, to this day, the grandchildren have never had an interest in the income which is the subject of the dispute over the Executor's accounting and their interest in principal remains contingent.

3. The Surrogate Court Proceedings.

Viola Sommer's and Felton's relationship apparently began to deteriorate soon after they began managing the Sommer Estate [D 9]. In fact, in 1984, Jack Sommer (Viola Sommer's son and Laura Sommer's husband) had his lawyers prepare a memo detailing allegations of fraud and mismanagement against Felton [D 9-10].

Due to the growing acrimonious nature of Felton's relationship with Viola Sommer, Murray Felton petitioned the Surrogate to file a final accounting of the Estate in August of 1984 [D 9]. Later that year, Viola Sommer and Murray Felton seemingly ironed out their dispute and entered into a new commission agreement which changed the terms of a prior agreement executed in 1980 [D 11]. Viola Sommer, represented by independent counsel, joined in the final accounting of the Estate and petitioned the Surrogate for its approval [D 12-14]. In addition, Viola Sommer and Jack Sommer executed releases for Felton and D&T [D 12-13].

(a) Guardian Bennett's Appointment

In conjunction with the proceeding to settle the final accounting of the Executors, Bennett was duly appointed, by order of the Nassau County Surrogate's Court dated November 13, 1984, to protect the interests of the infant grandchildren [D 14].[2] Four other attorneys were appointed to assist the Guardian with his duties [D 15]. Together they made an in-depth review of the Estate and submitted several reports to the Surrogate concerning their findings [D 16].

The guardian reports revealed that Guardian Bennett's investigation entailed an exhaustive and detailed inquiry

[2]Contrary to petitioner's claims [Petition pp. 6-7, 19], Bennett was not appointed due to "improper taking of and waste of Estate assets, revealed to the Surrogate's Court by the Sommer family." No such revelations to the court or to Bennett took place. This new allegation is but one of the new embellishments of the facts which surfaces for the first time with the Petition. The record reveals that although the Guardian was aware that Viola and Felton had some disagreements, the depth of their dispute was hidden and not known to him. At the time that Jack Sommer's memo detailing the alleged wrongdoing of Felton was first prepared and circulated, the Guardian had no knowledge of it. In fact, he did not learn of this memo until October of 1987 [D 28], after the closing of the Estate.

into the administration of the Estate and that no objection to the account had been raised by any interested party [D 20]. Further, based upon the documents provided to Guardian Bennett, he had no objection to the final accounting, and recommended that it be judicially settled covering the acts of the executors and trustees through December 31, 1985 [D 20]. The Guardian raised no objection to the commissions to be paid to Felton, by agreement, in lieu of his statutory commissions [D 19-20].[3] The Surrogate's Court issued its final decree of the judicial accounting of Felton and Sommer on September 24, 1986 [D 22-23]. The closing of the Estate having occurred, the Sommer challenge to the proceedings began.

(b) The Proceedings to Challenge the Settlement.

By order to show cause, Viola Sommer brought a petition in the Surrogate's court to vacate and open the decree settling the final account [D 23]. The basis of Viola Sommer's petition were allegations charging Felton and D&T with fraud, duress, coercion, misrepresentation, overreaching and abuse of a confidential relationship [D 23]. Guardian Bennett was then appointed to act as guardian *ad litem* for the infant wards in this proceeding [D 26]. He submitted a report stating that he had *no objection* to Viola Sommer's application to set aside the decree to the extent of any measurable benefit for his wards [D 29-30]. He also *reserved his rights* to examine Felton, Viola Sommer and D&T with respect to the allegations [D 39, 59]. By decision dated October 4, 1988, the Surrogate agreed to open the Estate decree to the extent of determining whether Viola Sommer was incapable of freely and rationally giving her

[3]All unpaid commissions were chargeable to *income* (in which the infant wards had no interest) and of the commissions theretofore paid, only about $1.8 million had been charged against principal. The Guardian's report reveals that the agreed commissions were far less than the available statutory commissions [D 19].

consent to the 1984 settlement agreement by reason of duress, coercion, fear or intimidation exerted by Felton and D&T [D 30-31].

During the pendency of the petition to reopen the estate, Laura Sommer, Adam's mother, made numerous attempts to compel the Guardian Bennett to institute a parallel proceeding in the Surrogate's Court and to recuse Judge Radigan [D 31-34].[4] Ultimately, after Guardian Bennett's credibility was directly put in issue, Judge Radigan recused himself, finding he could not fairly adjudicate such issue due to his long-standing professional relationship with the Guardian [D 34-35].[5] All outstanding matters were then referred to Acting Surrogate Harrington who denied Laura Sommer's outstanding applications [D 35-37].

At the time of Laura Sommer's efforts to compel a reopening by the Guardian, Bennett believed that opening the Estate could detrimentally impact upon his wards [D 29].[6] He, therefore, recognized that it was best for the wards to await the outcome of the discovery proceedings before he instituted a parallel action in the Surrogate's

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[4]Laura Sommer's voluminous applications, motions and tactics before the Surrogate are fully and completely set forth in the decision of Judge Mishler [D 31-34]. These actions included: (1) a motion to intervene to open and vacate the estate decree and to compel the Guardian to institute a parallel proceeding, (2) an order to show cause for the recusal of Judge Radigan and the disqualification of Guardian Bennett and (3) an application to the New York Supreme Court to recuse Judge Radigan [D 31-34].

[5]Besides hysterical hyperbole, there is nothing to petitioner's allegations that respondents were in league with the Surrogate Court, Felton and D&T [Petition, pp. 5, 23]. No such conspiracy exists. Rather, Guardian Bennett is a well respected former surrogate judge, and Surrogate Radigan had been his law clerk [D 35-36]. Moreover, there is no proof of a relationship between the Guardian and Felton or D&T.

[6]The final accounting of the estate awarded the wards certain vested interests which were obtained due to the efforts of Guardian Bennett [D 20-23].

Court or joined in the pending action by the Sommers [D 33]. Of critical significance here is the fact that the infants' rights have *not* been compromised; they are yet the subject of determinations to be made by the Surrogate. There has been no waiver or abandonment of the ability of the infants (including Adam Sommer) to challenge the settlement of the Estate, or take steps to reopen, should that effort be in their best interests [D 59].

In light of petitioner's allegations against Guardian Bennett, he sought the advice and direction of the Surrogate as to whether to continue to serve as guardian *ad litem* [D 50]. Thereafter, Guardian Bennett suffered a stroke [D 58-59] and upon request of the Bennett Firm, the Surrogate permitted him to resign [D 59]. The Surrogate appointed a new Guardian and Guardian Bennett prepared a final report [D 59]. The new guardian has the benefit of Guardian Bennett's reservation of rights and can act on it in any way he sees fit, including the institution of a parallel proceeding [D 59].

4. The Interplay Between This Action And The Surrogate Court Proceedings.

All of the petitioner's allegations are related to the wrongdoing alleged by Viola Sommer against Felton and D&T. Petitioner's counsel scrupulously ignores the prior proceedings and attempts to divert this Court from the manifest interplay between this action and the matters before the Surrogate. At the behest of Viola Sommer, the conduct of Felton and D&T is currently under scrutiny before the probate court, for the precise purpose of determining whether a re-opening will occur. Discovery in that proceeding will illuminate the allegations of wrongdoing and will enable the current Guardian, like Guardian Bennett before him, to determine whether a re-opening of the Estate is in the best interests of the petitioner. In fact, this

action specifically challenges the Guardian's decision on that issue—a decision which clearly involves *on-going judgments* to be made in the course of Surrogate proceedings.

It is only an orderly completion of the Surrogate proceedings which will determine whether fraud and coercion by Felton and D&T occurred, whether the proceeding can be re-opened, and whether the petitioner stands to benefit from a re-opening. Until such determinations are made, and until *known rights* of the petitioner are *foreclosed,* there can be no real assessment, on the current tort liability claims, of whether there was a breach of duty or whether any damage to the infant-petitioner's rights has occurred. For these reasons, the Circuit Court, like the district court, determined that dismissal was warranted for a lack of justiciability.

5. The Decision of the District Court.

The district court's dismissal was premised on three distinct grounds: standing, ripeness and the probate exception to diversity jurisdiction. Each determination was eminently correct, and fully supported by both the uncontested facts and the controlling law.

(a) Standing.

In its analysis of Adam Sommer's "personal stake" in this litigation, the district court was constrained to examine the petitioner's interest in the Estate, as delineated in the Sommer Will [D 4-8]. The lower court concluded, on the basis of the uncontested evidence, that Adam Sommer has a contingent remainder interest in the *principal* and *future income* of the Article Sixth Trust. His interest in future income will vest only if his parent, Jack Sommer, should die [D 6-7, 78-79]. The court correctly concluded that Adam has no interest in past income, meaning income already

paid to income beneficiaries [D 79]. The court, then, made a crucial recognition—that this lawsuit concerns conduct by the Estate executors (and defendants' review thereof), which began on May 1, 1979 and ended on December 31, 1985 [D 80]. Accordingly, to the extent that assets of the Estate were "wasted," and to the extent that those assets represent *income* to the trust, it represents past income in which Adam Sommer has no interest [D 80]. The court, in interpreting the Will, recognized that Adam does have a contingent future interest in principal and concluded that, to the extent that the lawsuit implicates the loss of principal, Adam may have a personal stake in the outcome [D 80-82].

Judge Mishler then endeavored to identify which counts of the complaint implicated either principal or income. He noted that the vast majority of the claimed losses involved only *past* income (in which Adam has no interest) [D 80-81]. The only "damage" claimed which effects principal, he concluded, was the $1,840,750 of commissions that were charged to principal, and the undervalued sale of the 48th and 53rd Street properties [D 80]. The court concluded that, even reading them in the light most favorable to the plaintiff, only four counts involved either the commissions or the properties: Count I (fraud), which alleged a failure to have an independent appraisal of the properties; Count III (breach of statutory duties), which avers that the Bennett Firm failed to insist on such appraisals; Count IV (negligence), which alleges misappropriation by Felton, and thus can be assumed to include the executors' commissions agreement; and Count VIII (breach of fiduciary duty), which again is premised on a failure to obtain appraisals of the properties [D 80-81]. The court ruled that these were the only claims in which Adam had a demonstrable interest: the remaining claims involved allegations which did not implicate the commissions or

properties and, hence, involved only past income in which petitioner has no interest [D 80].

(b) Ripeness.

The court further determined that, even as to those claims which implicated principal, the matter was not yet sufficiently ripe for review [D 82]. The district court appropriately concluded that "injury" to Adam's interests was not yet distinct and palpable, because it hinged on several contingent or uncertain events, i.e., whether the Estate was re-opened, whether there was a finding of misconduct by Felton and whether the current Guardian acts, and in which way he acts, on rights reserved by Guardian Bennett [D 82]. The court was correct in its recognition that it is only *when* these matters are resolved that a definitive determination can be made as to whether there has been a palpable injury to Adam Sommer's interest [D 82-83].

(c) The Probate Exception.

The district court also alternatively dismissed on the basis that the court lacked subject matter jurisdiction due to the probate exception to diversity jurisdiction. Here, Judge Mishler aptly recognized that jurisdiction is lacking when the litigation of the action will interfere with state probate matters [D 84, 86]. The district court recognized that the litigation of the issue of "injury," which is a necessary finding to petitioner's alleged tort claims, would work such an interference. Whether Felton's commission agreement is invalid, whether Felton and D&T committed fraud, and whether assets of the Estate were wasted (all of which must be determined in order to find that Adam Sommer had been injured) are matters currently pending before the state probate court. Thus, Judge Mishler concluded, "to force the claims to ripeness would involve interference with the pro-

ceedings in the probate court." [D 85-86] For these reasons, the court properly ordered dismissal.

6. The Decision of the Court of Appeals for the Second Circuit.

The Court of Appeals for the Second Circuit affirmed the dismissal of the complaint substantially on the basis of Judge Mishler's holdings regarding justiciability [B 3]. The Court held that to the extent that petitioner's claims focus on income payments in the past, he lacked standing for the reasons stated in Judge Mishler's opinion [B 3]. Moreover, the Court held that to the extent the claims focus on the petitioner's interest in principal, the claims are not ripe for the reasons stated in Judge Mishler's opinion [B 3]. The Court did not pass on the alternative grounds of the probate exception. Petitioner filed a petition for rehearing *en banc*, which was denied [A 2].

POINT I

A writ of certiorari should not issue on the basis of the application of the probate exception or the abstention doctrine to this case

Petitioner argues that the Second Circuit relied on the probate exception to diversity jurisdiction, and the abstention doctrine, in declining jurisdiction and suggests such determination is in conflict with decisions of other Circuits. In fact, petitioner's counsel misperceives both the scope of the decision and the applicable law.

First and foremost, the Second Circuit did not affirm the decision of the district court on the basis of the probate exception, but rather affirmed on the basis of the district court's holdings regarding standing and ripeness [B 3]. In

addition, although respondents argued below that the application of the abstention doctrine provided an alternative basis for dismissal, neither the district court nor the circuit court relied on abstention in finding that there was no subject matter jurisdiction. Accordingly, petitioner's arguments regarding the probate exception and the abstention doctrine are completely irrelevant to the issue of whether a writ of certiorari should issue.

In addition, even if the Second Circuit's order can arguably be read as authority regarding the probate exception, petitioner nonetheless fails to raise a legitimate and compelling ground for certiorari. It is well-settled that the federal courts generally do not have subject matter jurisdiction over probate matters even if there is diversity of citizenship between the parties to the lawsuit. *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Waterman v. Canal-Louisiana Bank and Trust Co.*, 215 U.S. 33, 44 (1909). Moreover, even in the instance where a lawsuit does not involve a pure question of probate, the federal court will decline jurisdiction when the resolution of the suit in federal court "will result in 'interference' with state probate proceedings or the assumption of general probate jurisdiction." *Rice v. Rice Found.*, 610 F.2d 471, 475-476 (7th Cir. 1979).

It is beyond question that the instant action interferes with pending proceedings in the probate court concerning Viola Sommer's petition to vacate the Estate decree and open the Estate. In this case, all of Adam Sommer's allegations against his guardian ad litem and the Guardian's attorneys relate to their purported failure to remedy the alleged misconduct of Felton and D&T. As noted by the district court, to force the plaintiff's claims to ripeness would involve interference with the proceedings in the state probate court because it would require determinations concerning issues which may yet be determined by the Surrogate, including the propriety of Felton and D&T's conduct

and the validity of the 1984 Executors' settlement agreement. In point of fact, the Surrogate opened the Estate decree to determine whether Viola Sommer freely and voluntarily agreed to the final accounting of the Estate. If it is ultimately determined that she did not, the Surrogate will then consider Viola Sommer's allegations of wrongdoing against Murray Felton and D&T. The issue below was the interference with probate proceedings, and the district court determined that this was inextricably bound to the ripeness issue. The New York Surrogate currently has before him the issue of the propriety of the Executor's Settlement. Whether the Estate can be re-opened on this basis will have a profound effect on determining the options available to Adam Sommer and whether, in fact, damage has occurred to his interests. The finding of the district court that this suit interfered with the matter currently before the probate court was eminently correct.

Petitioner suggests that a writ should be issued because the Second Circuit order conflicts with *Rice v. Rice Found.*, 610 F.2d 471 (7th Cir. 1979). Petitioner, however, provides no rational basis for this assertion. Examination of the *Rice* opinion demonstrates that there is no conflict between these cases. In *Rice v. Rice Found., supra,* the plaintiff claimed that he was deprived of his rightful share of the estates of both his parents by acts on the part of various defendants. At the time of the institution of the plaintiff's federal court action, the probate proceedings involving the parents' estates were pending in the state courts. The Seventh Circuit, *sua sponte,* raised the issue of the possible applicability of both the probate exception and the abstention doctrine. It noted that the relevant determination was whether the suit interfered with ongoing state probate proceedings. It also recognized that "[d]iscretionary abstention in probate-related matters is suggested not only by the strong state interest in such matters but also by special circumstances in particular cases." *Id.* at 477-78. However,

the Seventh Circuit did not resolve the question of subject matter jurisdiction, but remanded the issues to the district court.[7] Thus, the Second Circuit order in the instant matter does not conflict with the *Rice* decision: Judge Mishler's decision concerning the probate exception is in full conformity with the articulation of the probate exception as contained in the *Rice* opinion.

Petitioner also insinuates that certiorari should be granted because the Second Circuit's order herein conflicts with *Celentano v. Furer,* 602 F.Supp. 777 (S.D.N.Y. 1985). Again, petitioner provides little explanation of his position, but examination of the case proves the error of the argument. In *Celentano,* the plaintiff brought suit against the defendant, both in his individual capacity and as an executor of an Estate. The plaintiff sought damages for the breach of an agreement by the decedent to bequeath her certain property. The court found that it had jurisdiction because: (1) the suit did not implicate or tread upon the Surrogate's power over the estate or disposition of any property under its control and (2) there was concurrent jurisdiction in the N.Y. Supreme Court and the probate court over probate matters.

First, again assuming the Second Circuit's order relies on the probate exception (which it does not), *Celentano* is not a circuit decision, but a district court case of less precedential value. Therefore, any conflict does not provide a basis for certiorari. Second, petitioner's case is distinct from *Celentano* because the instant case involves allegations concerning the conduct of a guardian ad litem. A guardian ad litem is an officer of the Surrogate's Court, *Ford v. Moore,* 79 A.D.2d 403, 436 N.Y.S.2d 882 (1st Dept. 1981), and, therefore, it is the Surrogate's Court which has the power of

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[7]There is no reported decision as to how the district court determined the applicability of the probate exception in *Rice.*

removal, supervision and surcharge. Unlike the *Celentano* case, if the court were to entertain jurisdiction in this case, it would interfere with and abrogate powers vested in the Surrogate to supervise the guardian ad litem. *See, Comas v. Southern Bell Tel. & Tel. Co.*, 657 F.Supp. 117, 118 (S.D. Fla. 1987).

Finally, *Celentano* is, at best, a muddled decision. While Judge Wienfeld seems to have broadly held that because the New York Supreme Court could have heard the matter, the probate exception did not apply, he also acknowledged that the federal court could not grant all the requested relief, implicitly holding that some issues might be purely probate matters. This is obviously a contradictory holding. Defendants submit that to the extent *Celentano* can be read to state that concurrent jurisdiction of the New York Supreme Court (a court of general jurisdiction) nullifies the probate exception, it is in error: if that were so, there would be no probate exception in any federal court sitting in New York.

POINT II

A writ of certiorari should not issue on the basis of the Second Circuit's holding that this case is not justiciable.

Petitioner also seeks a writ of certiorari on the ground that the Second Circuit's order, affirming the district court's decision on standing and ripeness grounds, conflicts with prior decisions of the Supreme Court. Examination of petitioner's arguments reveals that he has not put forth any persuasive reason for issuing a writ of certiorari; rather, petitioner merely presents a tortured rehashing of his arguments below.

A. Standing

The standing issue addresses "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdictions and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin,* 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). In order to establish standing under Article III, three requirements must be met: (1) the plaintiff must allege "injury in fact"; (2) there must be a "causal connection between the asserted injury and the challenged action"; and (3) "the injury must be of a type 'likely to be redressed by a favorable decision.' " *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 804 (1985); (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464 (1982)); *see also, Whitmore v. Arkansas,* 110 S. Ct. 1717, 58 U.S.L.W. 4495 (1990).

On the standing issue, petitioner does not delineate any existing conflicts among the circuits, but nonetheless asks the court to issue a writ to avoid conflict. He also reargues his claim that the Second Circuit misapprehended the scope of the claims and thus misapplied the doctrine of standing. Finally, petitioner insists that this case presents an issue of exceptional public importance. Each of these arguments is wholly lacking in merit.

First, petitioner's failure to articulate an existing conflict among the circuits on the standing issue mandates denial of his petition. Petitioner cannot support an application for a writ of certiorari merely by making vague and unclear assertions that clarification is in order.

Second, petitioner's argument that he has standing with respect to Counts II, V, VI, VII because they include claims of injury to future income is of no import. This is, again, an improper attempt to simply reargue his position. The Circuit Court's determination that, "to the extent that Sommer's claims focus on income payments in the past, he lacks standing" was a statement that *any* claims involving past income (wherever contained) were lacking justiciability. The Second Circuit went on to find that plaintiff's claims as to principal and future income were otherwise not justiciable on ripeness grounds. Thus, *all* of petitioner's claims are barred, irrespective of where contained, either on standing or ripeness. It is accordingly pointless for petitioners to argue as to which count of the complaint involves which genre of interest.

Finally, the petition raises absolutely no issue of exceptional public importance warranting the exercise of this Court's discretionary power to issue a writ. Other than to argue that this case is important to Adam Sommer, petitioner does not define an *issue* of pressing public importance. Issues of standing and ripeness, if determined so as to result in dismissal, always have negative impact on eager plaintiffs. This is a fact of litigation, not a watershed issue meriting review by this Court.

B. Ripeness

The central concern of the ripeness doctrine is that "the tendered case involves uncertain and contingent future events that may not occur as anticipated or may not occur at all." *Metzenbaum v. Federal Energy Regulatory Com'n.*, 675 F.2d 1282, 1289-90 (D.C. Cir. 1982) (quoting Wright, Miller and E.Cooper, Federal Practice and Procedure: 13 Jurisdiction §3532 at 237-38 (1975)). In determining whether a case is ripe for judicial consideration, two factors must be considered: (1) the fitness of the issue for judicial

decision, and (2) the hardship to the parties of withholding court determination. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967). A claim is considered fit for decision if the issues raised are primarily legal and do not require further factual development, and the challenged action is final. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,* 833 F.2d 583 (5th Cir. 1987); *Trustees for Alaska v. Hodel,* 806 F.2d 1378 (9th Cir. 1986). If the record does not demonstrate that the plaintiff suffered any injury, dismissal for lack of ripeness is appropriate. *Metzenbaum,* 675 F.2d at 1290. In addition, to meet the hardship test, the plaintiff must show either an actual injury or a real and immediate threat of injury. *Pence v. Andrus,* 586 F.2d 733, 738 (9th Cir. 1978).

On the ripeness issue, petitioner claims that certiorari should be granted because the Second Circuit decision conflicts with *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967) and *Town of Rye N.Y. v. Skinner,* 907 F.2d 23 (2d Cir. 1990), *cert. denied,* 111 S.Ct. 673 (1991). The petitioner also reargues his claims that Counts I, III, V and VIII are ripe because they allege injury to principal and the harm is complete. Finally, petitioner alleges that certiorari is appropriate because of alleged misstatements by respondents' counsel's at oral argument before the Second Circuit. Each of these arguments fails to provide a basis for the issuance of a writ.

Petitioner's argument that certiorari should be granted because the claims involve principal and the harm is complete is misguided. The certiorari process is not meant to provide petitioner with a forum to rehash his claims below. In addition, this argument completely ignores that there is an ongoing Estate proceeding (to re-open) which will affect whether petitioner will be in a position to allege an actual injury to his contingent interest in principal and future income as a result of the Guardian's conduct. For example,

the Estate may be reopened, the Surrogate may find that Felton and D&T were guilty of misconduct, and the present guardian may successfully bring a separate action which might redress any injury Adam may allege. Alternatively, the Estate may not be reopened, but the present guardian, acting on rights reserved by Guardian Bennett, may still institute such a proceeding and effect redress to the interests of Adam Sommer. Yet another alternative is that the Estate may be reopened, there may be a finding that Felton and D&T committed no misconduct, and that finding, binding on the Estate, will refute all claims of injury as a result of the Guardian's purported failure to remedy misconduct by Felton and D&T. These are some of the possible determinations which may result from the on-going Surrogate's Court proceeding. Therefore, it is patently clear that until the Estate proceedings are completed, any claim of certain injury is premature.

Additionally, petitioner's claim that a writ should issue because the decision herein conflicts with *Town of Rye v. Skinner, supra,* is utterly unpersuasive. First, any purported conflict between the instant case and *Town of Rye* does not present any conflict among the circuits since both cases emanate from the Second Circuit. Second, the two decisions are distinguishable and present no conflict. In *Town of Rye,* the petitioners alleged that a challenge to the FAA's approval of various projects at the Westchester County Airport was not ripe for review because funding for the project was uncertain. The court disagreed because there remained nothing else for the FAA to do in evaluating the environmental impact of the airport projects. In other words, the FAA's decision was final and not subject to change. By contrast, there are significant questions regarding the finality of Adam Sommer's purported injury in this case; there is a strong possibility that any purported injury may be redressed in the Surrogate's Court.

Similarly, petitioner's argument that the decision herein conflicts with *Abbott Laboratories v. Gardner, supra,* is also unavailing. In *Abbott Laboratories,* plaintiffs sought to enjoin the enforcement of certain regulations promulgated by the Commissioner of Food and Drugs which required certain labelling. At the time of the suit, the regulations had not been enforced against any of the plaintiffs. The court held that the case was ripe for judicial determination because the issuance of the regulations constituted the final agency action. By contrast, as noted, there is nothing final about petitioner's alleged injury. Petitioner's position, argued twice below, is that since Guardian Bennett's conduct is complete, injury to Adam Sommer is complete and certain. Petitioner's counsel persists in confusing the concepts of *conduct* and *damage:* as proved to the satisfaction of both the District and Circuit Courts, the determinations of the Surrogate will operate to define, establish or negate injury to Adam Sommer. Moreover, there is no demonstrable hardship to petitioner by the finding of a lack of ripeness. The Circuit Court's decision was in full conformity with established authority and does not warrant review by this Court.

Finally, petitioner cannot, as he attempts here, support a petition for a writ of certiorari by complaining that respondents' counsel's statements at oral argument before the Second Circuit misled the court. Such a charge is both unsupportable and dehors the record. Apparently, respondents' counsel has joined a fairly distinguished list of persons condemned by the Sommer Estate representatives. There is simply no truth to the charge, which was made to the Circuit Court and rejected. Moreover, such baseless accusations hardly constitute a sufficient showing for the issuance of a writ. Indeed, the mere fact that petitioner's counsel tries to manufacture such an issue reveals the frailty of his position before this Court.

POINT III

The respondent's failure to file a 3(g) statement does not constitute grounds for issuance of a writ of certiorari.

Petitioner also seeks a writ of certiorari on the basis that both the district court and the Court of Appeals sanctioned an "obvious and far departure from normal procedure" by granting respondents summary judgment in the absence of a 3(g) statement. Petitioner's contention is wholly without merit and places undue importance on the 3(g) process.

Rule 3(g) serves a valuable function because it requires parties to an action to define the issues in litigation. *Zeno v. Cropper,* 650 F.Supp. 138, 139 (S.D.N.Y. 1986). However, the courts are not required to blindly deny motions when the parties do not provide 3(g) statements when the affidavits, briefs and exhibits submitted on the motion clearly supply the uncontroverted facts pertinent to the motion. *See, Lucky-Goldstar Int'l, Inc. v. S.S. California Mercury,* 750 F.Supp. 141, 143 (S.D.N.Y. 1990); *Miller v. Swissre Holding, Inc.,* 731 F.Supp. 129, 130 (S.D.N.Y. 1990); *Salahuddin v. Coughlin,* 674 F.Supp. 1048, 1051-52 n.6 (S.D.N.Y. 1987); *Zeno v. Cropper,* 650 F.Supp. 138, 139-40 (S.D.N.Y. 1986). In fact, the language of the rule itself indicates that denial of a summary judgment motion for failure to file a 3(g) statement is discretionary—such a failure *may* " 'constitute grounds for denial of the motion.' " *Accord, Lucky-Goldstar, Int'l, Inc. v. S.S. California Mercury, supra* (citing Civil Rule 3(g)).

In a recent Southern District case, *Lucky Goldstar Int'l, Inc. v. S.S. California Mercury, supra,* the co-defendant argued that defendant was not entitled to summary judgment because it had not submitted a 3(g) statement with its initial motion papers. In declining to deny summary judg-

ment on this ground, the court noted that, "[w]here the facts required by the 3(g) statement can be gleaned from other documents submitted in support and opposition to the motion, failure to comply with Rule 3(g) does not compel denial." *Id.* at 143. The court also concluded that "it would serve no purpose to deny th[e] motion on the basis of this minor procedural error, particularly where no prejudice to the other parties . . . has been shown." *Id.* at 144.

Similarly, in *Miller v. Swissre Holding, Inc., supra,* the Southern District also declined to deny defendant's motion for summary judgment despite the fact that neither party submitted a 3(g) statement. Instead, the court set forth in its opinion a statement of the relevant facts which it compiled from all of the documents submitted in support of and in opposition to the pending motions.

Review of Judge Mishler's opinion reveals that the district court also compiled a statement of uncontroverted facts from the various documents submitted in support of and in opposition to the motion. Thus, there is no reason to assume that the lack of a 3(g) statement by the defendants hampered the judicial determination of the motion for summary judgment in any way. Petitioner's contention that the court was "forced" to adopt respondents' version of the facts is without any support whatsoever. This is especially so since the court had the assistance of petitioner's 3(g) statement.

Moreover, the failure to file a 3(g) statement was both inconsequential and harmless under the facts of this case. The grounds on which dismissal was sought were purely legal, and no factual disputes were pertinent to the court's decision.

Finally, respondents' "failure" to file a 3(g) statement is of no import because the procedural posture of this case required no such filing. Respondents moved for an order to dismiss, in lieu of answering, pursuant to Rule 12(b) and did not move for summary judgment pursuant to Rule 56. Local Rule 3(g) makes it abundantly clear that a statement of undisputed material facts is to be annexed to a notice of motion for summary judgment pursuant to Rule 56. The court's ultimate determination to convert the dismissal motion into one for summary judgment does not, contrary to the petitioner's erroneous assertion, require that such a statement be filed.

Conclusion

For all the reasons stated above, petitioner has failed to set forth any basis justifying review by this Court. The petition for a writ of certiorari should be denied in its entirety.

Dated: New York, New York
October 3, 1991

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